

**A  
KALEIDOSCOPE  
OF JUSTICE**

**CONTAINING AUTHENTIC ACCOUNTS OF  
TRIAL SCENES  
FROM ALL TIMES AND CLIMES**

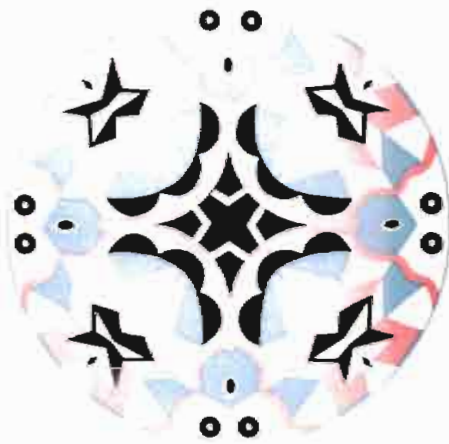
**By**

**JOHN H. WIGMORE**

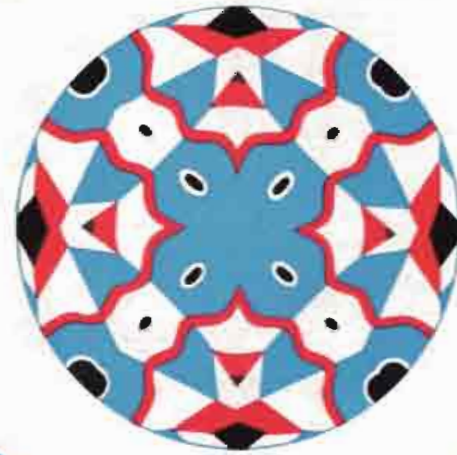
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# A KALEIDOSCOPE OF JUSTICE



EUROPE



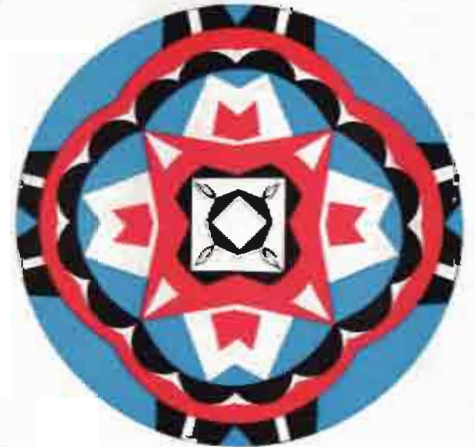
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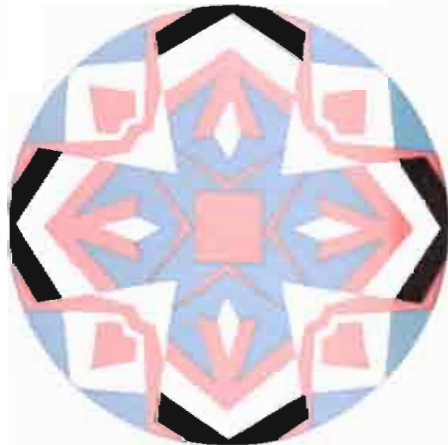
AFRICA



BASIC PATTERN



AMERICA



OCEANIA



ANCIENT PEOPLES

When the Basic Pattern Revolves, the Prisms Cause Variant Patterns in Different Communities;  
But the Latent Elements Remain the Same Throughout

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WIGMORE KAL

TO THE MEMORY OF

**Charles William Eliot**

PRESIDENT OF HARVARD UNIVERSITY  
WHO SENT THE EDITOR IN THE DAYS OF HIS YOUTH  
TO THE ORIENT AS A TEACHER OF AMERICAN LAW  
AND THUS OPENED FOR HIM THE DOOR  
LEADING TO THE STUDY OF THE SCIENCE OF  
COMPARATIVE LEGAL IDEAS

*Whether it be ordeal in an African village or in medieval times, or trial by battle as it once existed over a great part of Europe, or the rough and ready justice of a mining camp, or the elaborate procedure of an ecclesiastical court, the various modes fall into a few groups. . . .*

*A trial is in its substance a struggle, a battle in a closed arena. It is a shock of contending forces, a contest which may arouse the fiercest passions. . . . Often a trial is the one luminous point in darkness, the one opening in an otherwise blank wall between us and the past. It takes one outside the formulae of the textbooks. Faithfully reported, a trial is a living picture; it brings us nearer to life than the best literature; you hear the voices; it is life itself. Certainly for studying and understanding an ancient or foreign legal system nothing is more instructive than acquaintance with an actual trial. You may read in Gaius, Beaumanoir, or Bracton, texts descriptive of procedure, and many points will remain in obscurity, which the records of a single trial illuminate.*

(SIR JOHN MACDONNELL, "HISTORIC TRIALS" (1927), p. 1.)

## PREFACE

READER! this work is not offered to you as a piece of scientific research, but mainly as a book of informational entertainment.

The drama of a judicial trial rarely fails to stir a thrill of emotional interest in any spectator,—certainly the layman, and even the callous lawyer. In this book are collected authentic accounts of trials of varied styles throughout the countries of the world in all times and climes,—covering the far countries with their alien atmosphere and the historic times of our own past. The result is to offer a kaleidoscopic picture of the variant procedural methods by which the peoples of the world everywhere have sought to attain the great common objective of doing justice between man and man.

And what is a "kaleidoscope"? It is now only a child's toy, though it was once regarded as a scientific instrument when it was invented a century or more ago. A dictionary definition would be: "An instrument in the shape of a telescopic tube containing colored pieces of glass with reflecting surfaces, so arranged that when it is revolved by hand the same pieces fall at each turn again and again into new symmetrical varicolored forms". And the Kaleidoscope of Justice shows the different peoples of the world in all times and climes perpetually engaged in this perennial process of seeking to administer justice, in one or another fashion. The same recurring elements are found combining again and again in new designs.

What are these recurring variant elements? The kind of community in which the trial takes place; the kind of ruler—king, chief, or people—that is exercising the power of justice; the personnel of the tribunal; the party complaining or prosecuting; the quest for the wrongdoer, and his arrest and detention; the oppor-



tunity given for a hearing; the kind of proof; the deliberations of the tribunal; and the judgment that frees or convicts the accused. All these elements in a trial change as we travel through times and climes; and yet all are latent in one form or another, though making a different picture in each country and epoch. Is there any reader who will not be entertained by some of these strange and peculiar narratives, dug out from all sorts of authentic sources, of what has been transacted in the name of administering justice?

But, though these variant methods need not be perused as materials for any scientific generalizations, they may at least stimulate serious reflection upon this world-wide time-old universal yearning of all peoples to devise ways of doing justice,—clumsy or efficient, crude or rational—and upon the singular variety of peculiar ways in which they have managed to satisfy that yearning. “Justice, O royal Duke!” cries Mariana, in *Measure for Measure*, as she throws herself at the feet of the Duke in his courtroom, “Hear me in my true complaint, and give me justice! justice! justice! justice!” And such has been the universal cry, since the dawn of organized community-life everywhere in the world.

The present-day methods of trial, under the modern, more-or-less standardized codes of the Anglican and Romanesque systems—now obtaining in the advanced countries of both hemispheres—are not dealt with in this work. Their general features are well enough known to all; and an adequately detailed description would fill a volume by itself. Such a volume, indeed, already is available in the present series of Legal Classics,—Mr. Wm. L. Burdick’s “The Bench and Bar of Other Lands”,<sup>1</sup> in which the author interestingly describes, with amply informative detail, the procedure as observed by him in a tour around the world.

The present work has been inspired by the view that, in any study of our own present-day methods, it may help us to have in mind the extraordinary variety of ways in which the same objective of Humanity has been sought throughout all times and climes.

<sup>1</sup> Metropolitan Law Book Company, Inc., Brooklyn, N. Y., 1939.

What has made this collection of pen-pictures possible, and also (perhaps) unique, is that the sources used have been chiefly, not the usual law-texts, but records of travel and adventure by eye-witnesses of the scenes described. The usual sources of Law consist of formal texts by legislators, judges, and jurists, declaring the rules and their interpretation. But the eye-witness report of a trial as actually conducted has rarely formed part of the regular or official records of justice. England has possessed one invaluable series since the 1500s; in the United States they begin to be found in the early 1800s; on the Continent, a few are found before that century. But for the earlier periods, and in the far countries of other legal systems, one must chiefly rely upon the reports of adventurous travelers or other lay chroniclers. These men tell us of Justice as it is done,—not of Justice as by the books it is supposed to be done.

The field available for such narratives is unbelievably rich. In the present selection, comparatively little of the extant material has been touched. The pages of the 160 odd volumes of the Hakluyt Society’s publications have been searched, as well as those of the other Voyages series, and of scores and scores of modern travel memoirs that happened to be accessible. But in the second-hand booksellers’ lists, European and American, can be found hundreds and hundreds of inaccessible titles that must have contained scores of eye-witness accounts of trial-styles in every country and period,—titles in Russian and Arabic (for the Arabs were the great travelers of the 900s–1200s) as well as in English, French, Italian, Spanish, and other languages.

There is here a mine of richest value for some one who will open it up. Perhaps some day an editor will be found who will care to compile a series of this sort,—“The Kaleidoscope of Justice”, Volume Two, and so on.

This book is not offered for recording any scientific views, but to enable the reader to share the entertainment which the compiler has had in perusing these records of the varied ingenuity of the human mind in devising ways of doing justice. Yet the tempta-

## PREFACE

tion is strong to draw inferences from these scattered instances to some general truths,—truths of evolution and principles of policy. With this purpose an Epilogue—Chap. XXXI—has been added, at the end of the volume, for those who might care to draw deeper lessons.

NORTHWESTERN UNIVERSITY LAW SCHOOL

March 4, 1941.



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†

# *A Kaleidoscope of Justice*

*Trial Styles in  
All Times and Climes*

*Part I. EUROPE*

*Chapter I*

*THE ORDEALS*



## THE ORDEALS

### Introduction.<sup>1</sup>

[Ordeals, as modes of trial and tests of truth, have been in use by probably every people of the world, at some stage or other of its history, as it came to adopt consciously some plan for doing justice upon an offender. In a few instances, the earliest historical records extant show that the people had already passed beyond that stage. In many others, notably the native peoples of retarded development in Africa and America, they are found still believing in the efficacy of ordeals.

The theory of the ordeal is that a Divine or supernatural Power can make manifest to mankind the truth in a controversy, and that it will do so when properly besought. Thus, every type of supernatural belief, whether an organized intellectual theology or only (what we may choose to call) a primitive superstition, may serve to give form and effect to ordeals.

The variety of such forms has been almost endless. Some of the instances found in Africa (*post*, Chap. 17), in Asia (*post*, Chaps. 9, 11) and in America (*post*, Chap. 19) illustrate this variety. Even the wager of battle (*post*, Chap. 2) was sometimes spoken of as a *judicium Dei*.

But in Europe there were only five or six forms in general use among the dozen or so Germanic tribes that overran and occupied western Europe in the first few centuries of the Christian era. And when these peoples were Christianized, somewhere after A.D. 400, the Church found it necessary to tolerate the popular belief in these ordeals, and to give its sanction by elaborate ceremonies explicitly invoking the Divine aid. Here are set forth the Church's ceremonies for the four principal ordeals,—the ordeals of hot iron, of boiling water, of fire, and of cold water.

1. This introductory sketch is summarized from Mr. Lea's authoritative treatise, cited *post*.

## Chapter I

1. *The Ordeal of Hot Iron.*
2. *The Ordeal of Boiling Water.*
3. *The Ordeal of Fire.*
4. *The Ordeal of Cold Water.*

A common impression, received when one first reads the details of these ordeals, is that the innocent person had little chance to escape. But this impression is erroneous, and for three reasons. (1) In the first place, the records seem to show that the process probably acquitted the guilty quite as often as it convicted the innocent. Professor Maitland, for example, noted in a study covering the years A.D. 1201 and 1219, when the ordeals were in constant use, that he found but a single instance in which they failed to clear the accused. (2) In the second place, the accused was put to the ordeal only after strong probable evidence had been presented against him,—for example, the prosecutor's oath with oath-helpers, or a public reputation of guilt, or fresh pursuit with hue and cry, etc. Thus, the ordeal was for the accused really a chance to escape what would probably have meant conviction. (3) In the third place, there was (in the later period) always the possibility of manipulation of the ordeal, by collusion of the authorities, to favor the accused; the records demonstrate this.

It was this possibility of manipulation, together with the general intellectual advance, and the rise of more efficient methods of trial, which gradually undermined public confidence in the ordeals,—at least among enlightened rulers. As early as A.D. 777 the wise Emperor Charlemagne sought to limit the use of ordeals to minor controversies. But they went on in constant use for several centuries in various domains. For example, the English Assize of Clarendon, in A.D. 1166, directed that all persons presented for murder, robbery, and other felonies, be tried by the cold-water ordeal, except those who confessed or were found in possession of stolen goods.

Finally, however, the supreme Church authorities took official notice of the public lack of confidence in ordeals. Under Pope Innocent III, the progressive legislator-pope, the Fourth Council of the Lateran, A.D. 1215, forbade the use of ordeals by the Church tribunals. By this period, more efficient methods of trial were emerging into active development,—the Church's inquisitorial method (i. e. examination of witnesses by a judge) and the English trial by jury.

The secular authorities soon followed the Church's pronouncement. In England, an order of Henry III, A.D. 1219, forbade the judges on their circuits to countenance the ordeals of fire and of water. Other rulers on the Continent followed suit. In judicial practice, the ordeals, though lingering in places, finally were entirely abandoned.]

### 1. The Ordeal of Hot Iron, about A.D. 1000.<sup>1</sup>

A fire was kindled within the church, not far from the great altar. The person about to undergo the ordeal was placed in front of the fire, surrounded by his friends, by all who were in any way interested in the result of the trial, and by the whole clergy of the vicinity. Upon a table near the fire, the coulter over which he was to walk, the bar he was to carry, or, if he were a knight, the steel gloves which, after they had been made red-hot, he was to put on his hands, were placed in view of all.

Part of the usual service of the day being performed, a priest advances, and places himself in front of the fire, uttering, at the same moment, the following prayer (which is the first Mr. Busching gives):—

“O Lord God, bless this place, that herein there may be health, and holiness, and purity, and sanctification, and victory, and humility, and meekness, fulfilment of the law, and obedience to God the Father, the Son, and the Holy Ghost. May Thy blessing, O God of purity and justice, be upon this place, and upon all that be therein; for the sake of Christ, the Redeemer of the world.”

A second priest now lifts the iron, and bears it towards the fire. A series of prayers follows—all to be repeated ere the iron is laid on the fire.

These are the prayers to be said over the Fire and the Iron.

“1. Lord God, Almighty Father, Fountain of Light, hear us. Enlighten us, O thou that dwellest in light unapproachable. Bless

1. From Sir Walter Scott, “The Fair Maid of Perth”, Note to Chap. 23; quoting from a Scotch author *Janus* (anonym), in 1825, who quoted from a document published by the German historian Busching.

this fire, O God; and as from the midst of the fire Thou didst of old enlighten Moses, so from this flame enlighten and purify our hearts, that we may be worthy, through Christ our Lord, to come unto Thee, and unto the life eternal."

"2. Our Father which art in Heaven," etc.

"3. O Lord, save Thy servant. Lord God, send him help out of Zion, Thy holy hill. Save him, O Lord. Hear us, O Lord. O Lord, be with us."

"4. O God, Holy and Almighty, hear us. By the majesty of Thy most holy name, and by the coming of Thy dear Son, and by the gift of the comfort of Thy Holy Spirit, and by the justice of Thine eternal seat, hear us, good Lord. Purify this metal, and sanctify it, that all falsehood and deceit of the devil may be cast out of it, and utterly removed; and that the truth of Thy righteous judgment may be opened and made manifest to all the faithful that cry unto Thee this day, through Jesus Christ, our Lord."

The iron is now placed in the fire, and sprinkled with consecrated water, both before and after it is so placed. The mass is said while the iron is heating, the introductory scripture being, "O Lord, Thou art just, and righteous are all thy judgments." The priest delivers the wafer to the person about to be tried, and, ere he communicates [by eating it], the following prayer is said by the priest and congregation:—

"We pray unto Thee, O God, that it may please Thee to absolve this Thy servant, and to clear him from his sins. Purify him, O heavenly Father, from all the stains of the flesh, and enable him, by Thy all-covering and atoning grace, to pass through this fire,—Thy creature triumphantly being justified in Christ our Lord."

Then the Gospel:—"Then there came one unto Jesus, who fell upon his knees, and cried out, Good Master, what must I do that I may be saved? Jesus said, Why callest thou me good?" etc.

The chief priest, from the altar, now addresses the accused, who is still kneeling near the fire:—

"By the name of the Father, and of the Son, and of the Holy Ghost, and by the Christianity whose name thou bearest, and by

the baptism in which thou wert born again, and by all the blessed relics of the saints of God that are preserved in this church, I conjure thee, Come not unto this altar, nor eat of this body of Christ, if thou beest guilty in the things that are laid to thy charge; but if thou beest innocent therein, come, brother, and come freely."

The accused then comes forward and communicates, the priest saying, "This day may the body and blood of Jesus Christ, which were given and shed for thee, be thy protection and thy succour, yea, even in the midst of the flame."

The priest now reads this prayer:—"O Lord, it hath pleased Thee to accept our spiritual sacrifice. May the joyful partaking in this holy sacrament be comfortable and useful to all that are here present, and serviceable to the removing of the bondage and thralldom of whatsoever sins do most easily beset us. Grant also, that to this thy servant it may be of exceeding comfort, gladdening his heart, until the truth of Thy righteous judgment be revealed."

The organ now peals, and Kyrie Eleison and the Litany are sung in full chorus.

After this comes another prayer:—

"O God! Thou that through fire has shown forth so many signs of thy almighty power! Thou that didst snatch Abraham, thy servant, out of the brands and flames of the Chaldeans, wherein many were consumed! Thou that didst cause the bush to burn before the eyes of Moses, and yet not to be consumed! God, that didst send Thy Holy Spirit in the likeness of tongues of fiery flame, to the end that Thy faithful servants might be visited and set apart from the unbelieving generation! God, that didst safely conduct the three children through the flame of the Babylonians! God, that didst waste Sodom with fire from heaven, and preserve Lot, Thy servant, as a sign and a token of Thy mercy! O God, show forth yet once again Thy visible power, and the majesty of Thy unerring judgment; that truth may be made manifest, and falsehood avenged, make Thou this fire Thy minister before us; powerless be it where is the power of purity, but sorely burning, even to the flesh and the sinews, the hand that hath done evil, and

that hath not feared to be lifted up in false swearing. O God! from whose eye nothing can be concealed, make Thou this fire Thy voice to us thy servants, that it may reveal innocence, or cover iniquity with shame. Judge of all the earth! hear us: hear us, good Lord, for the sake of Jesus Christ Thy Son."

The priest now dashes once more the holy water over the fire, saying, "Upon this fire be the blessing of the Father, and of the Son, and of the Holy Ghost, that it may be a sign to us of the righteous judgment of God."

The priest pauses; instantly the accused approaches to the fire, and lifts the iron, which he carries nine yards from the flame.

The moment he lays it down he is surrounded by the priests, and borne by them into the vestry; there his hands are wrapped in linen cloths, sealed down with the signet of the church: these are removed on the third day, when he is declared innocent or guilty, according to the condition in which his hands are found. "*Si sinus rubescens in vestigio ferri reperiatur, culpabilis dicatur. Sin autem mundus reperiatur, Laus Deo referatur.*" [If a ruddy stripe be found in the track of the iron, let him be deemed guilty. But if it be found clean, let praise be given to God.]

## 2. The Ordeal of Boiling Water.<sup>1</sup>

The ordeal of boiling water (*aeneum, judicium aquae ferventis, cacabus, caldaria*) is the one usually referred to in the most ancient texts of laws. It was a favorite both with the secular and ecclesiastical authorities. . . . As a means of judicial investigation, the Church, in adopting it with the other ordeals, followed the policy of surrounding it with all the solemnity which her most venerated rites could impart. . . . Fasting and prayer were enjoined for three days previous, and the ceremony commenced with special prayers and adjurations, introduced for the purpose into the litany, and recited by the officiating priests; mass was celebrated, and the accused was required to partake of the sac-

1. From Henry Charles Lea, "Superstition and Force: Essays on the Wager of Law, Wager of Battle, the Ordeal, Torture", Philadelphia, Lea Bros. & Co., 1892, 4th ed. p. 278.

rament under the fearful adjuration, "This body and blood of our Lord Jesus Christ be to thee this day a manifestation!" This was followed by an exorcism of the water, of which numerous formulas are on record, varying in detail, but all manifesting the robust faith with which man assumed to control the action of his Creator. A single specimen will suffice.

"O creature of water, I adjure thee by the living God, by the holy God who in the beginning separated thee from the dry land; I adjure thee by the living God who led thee from the fountain of Paradise, and in four rivers commanded thee to encompass the world; I adjure thee by Him who in Cana of Galilee by His will changed thee to wine, who trod on thee with his holy feet, who gave thee the name Siloa; I adjure thee by the God who in thee cleansed Naaman, the Syrian, of his leprosy;—saying, O holy water, O blessed water, water which washest the dust and sins of the world, I adjure thee by the living God that thou shalt show thyself pure, nor retain any false image, but shalt be exorcised water, to make manifest and reveal and bring to naught all falsehood, and to make manifest and bring to light all truth; so that he who shall place his hand in thee, if his cause be just and true, shall receive no hurt; but if he be perjured, let his hand be burned with fire, that all men may know the power of our Lord Jesus Christ, who will come, with the Holy Ghost, to judge with fire the quick and the dead, and the world! Amen!"

After the hand had been plunged in the seething caldron, it was carefully enveloped in a cloth, sealed with the signet of the judge, and three days afterwards it was unwrapped, when the guilt or innocence of the party was announced by the condition of the member. By way of extra precaution, in some rituals it is ordered that during this interval holy water and blessed salt be mingled in all the food and drink of the patient—presumably to avert diabolic interference with the result.

The judicial use of this ordeal is shown in a charter of the monastery of Sobrada in Galicia, when, about 987, the Bishop of Lugo claimed of it for his church the manor of Villarplano. After a vain effort to decide the question by evidence, the representatives

of the monastery took a solemn oath as to its rights and offered to confirm it by the *paena caldaria*. In the church of San Julianio some fifty or sixty notables from both sides assembled; a monk named Salamiro was conducted to the boiling caldron by a person representing each claimant, and there he drew forth ten stones from the bubbling water. His arm was sealed up and three or four days later was exhibited uninjured to the assembly. The proof was conclusive and the Bishop of Lugo abandoned his claim. . . .

St. Bertrand, Bishop of Comminges, adopted a similar method in a case of disputed paternity. A poor woman came to him with a starving infant, which the father refused to recognize or provide for, lest such evidence of sin should render him ineligible for an ecclesiastical benefice. The bishop summoned the offender, who stoutly denied the allegation, until a vessel of cold water was brought and a stone thrown in, when the bishop blessed the water, and ordered the father to take out the stone, saying that the result would show the truth or falsity of his asseverations. Full of confidence, the man plunged in his hand and brought out the stone, with his hand scaled as though the water had been boiling. He promptly admitted his guilt, acknowledged the child, and thenceforth provided for it.

### 3. The Ordeal of Fire.<sup>1</sup>

The ordeal of fire, administered directly, without the intervention either of water or of iron, is one of the most ancient forms. . . . In India, as practised in modern times, its form approaches somewhat the ordeal of the burning ploughshares. A trench is dug nine hands in length, two spans in breadth, and one span in depth. This is filled with peepul wood, which is then set on fire, and the accused walks into it with bare feet. A more humane modification is described in the seventh century by Hiouen-Thsang as in use when the accused was too tender to undergo the trial by red-hot iron. He simply cast into the flames certain

1. From Henry C. Lea, "Superstition and Force", p. 308; cited *ante*, No. 2.

flower-buds, when, if they opened their leaves, he was acquitted; if they were burnt up, he was condemned. . . .

The earliest legal allusion to this form of ordeal in Europe occurs in the code of the Ripuarian Franks, where it is prescribed as applicable to slaves and strangers, in some cases of doubt. From the phraseology of these passages, we may conclude that it was then administered by placing the hand of the accused in a fire. As a legal ordeal this is perhaps the only allusion to it in European jurisprudence, but it was repeatedly resorted to by enthusiasts as a voluntary trial for the purpose of establishing the truth of accusations or of substantiating their position. In these cases it was conducted on a larger and more impressive scale; huge pyres were built, and the individual undergoing the trial literally walked through the flames, as Siawush did.

The celebrated Petrus Igneus gained his surname and reputation by an exploit of this kind, which was renowned in its day. Pietro di Pavia, Bishop of Florence, unpopular with the citizens, but protected by Godfrey, Duke of Tuscany, was accused of simony and heresy. Being acquitted by the Council of Rome, in 1063, and the offer of his accusers to prove his guilt by the ordeal of fire being refused, he endeavored to put down his adversaries by tyranny and oppression. Great disturbances resulted, and at length, in 1067, the monks of Vallombrosa, who had borne a leading part in denouncing the bishop, and who had suffered severely in consequence (the episcopal troops having burned the monastery of St. Salvio and slaughtered the cenobites), resolved to decide the question by the ordeal, incited thereto by no less than three thousand enthusiastic Florentines who assembled there for the purpose.

Pietro Aldobrandini, a monk of Vallombrosa, urged by his superior, the holy S. Giovanni Gualberto, offered himself to undergo the trial. After imposing religious ceremonies, he walked slowly between two piles of blazing wood, ten feet long, five feet wide, and four and a half feet high, the passage between them being six feet wide and covered with an inch or two of glowing coals. The violence of the flames agitated his dress and hair, but he emerged without hurt, even the hair on his legs being unsinged, barelegged

and barefooted though he was. Desiring to return through the pyre, he was prevented by the admiring crowd, who rushed around him in triumph, kissing his feet and garments, and endangering his life in their transports, until he was rescued by his fellow monks. A formal statement of the facts was sent to Rome by the Florentines, the Papal Court gave way, and the bishop was deposed; while the monk who had given so striking a proof of his steadfast faith was marked for promotion, and eventually died Cardinal of Albano.

An example of a similar nature occurred in Milan in 1103, when the Archbishop Grossolano was accused of simony by a priest named Liutprand, who, having no proof to sustain his charge, offered the ordeal of fire. All the money he could raise he expended in procuring fuel; but when all was ready the partisans of the archbishop attacked the preparations and carried off the wood. The populace, deprived of the promised exhibition, grew turbulent, and Grossolano was obliged not only to assent to the trial, but to join the authorities in providing the necessary materials. In the Piazza di S. Ambrogio two piles were accordingly built, each ten cubits long, by four cubits in height and width, with a gangway between them of a cubit and a half. As the undaunted priest entered the blazing mass, the flames divided before him and closed as he passed, allowing him to emerge in safety, although with two slight injuries, one a burn on the hand, received while sprinkling the fire before entering, the other on the foot, which he attributed to a kick from a horse in the crowd that awaited his exit. The evidence was accepted as conclusive by the people, and Grossolano was obliged to retire to Rome. Pascal II., however, received him graciously, and the Milanese suffragans disapproved of the summary conviction of their metropolitan, to which they were probably all equally liable. The injuries received by Liutprand were exaggerated, a tumult was excited in Milan, the priest was obliged to seek safety in flight, and Grossolano was restored for a time. But the adverse party prevailed and in spite of papal support he was forced to exile.

#### 4. The Ordeal of Cold Water.<sup>1</sup>

The cold-water ordeal (*judicium aquae frigidae*) differed from most of its congeners in requiring a miracle to convict the accused, as in the natural order of things he escaped. The preliminary solemnities, fasting, prayer, and religious rites, were similar to those already described; holy water sometimes was given to the accused to drink; the reservoir of water, or pond, was then exorcised with formulas exhibiting the same combination of faith and impiety, and the accused, bound with cords, was slowly lowered into it with a rope, to prevent fraud if guilty, and to save him from drowning if innocent. According to Anglo-Saxon rule, the length of rope allowed under water was an ell and a half; in one ritual it is directed that a knot be made in the rope at a distance of a long hair from the body of the accused, and if he sinks so as to bring the knot down to the surface of the water, he is cleared.

But in process of time nice questions arose as to the precise amount of submergence requisite for acquittal. Towards the close of the twelfth century we find that some learned doctors insisted that sinking to the very bottom of the water was indispensable; others decided that if the whole person were submerged it was sufficient; while others again reasoned that as the hair was an accident or excrement of the body, it had the privilege of floating without convicting its owner, if the rest of the body was satisfactorily covered.

The basis of this ordeal was the belief, handed down from the primitive Aryans, that the pure element would not receive into its bosom any one stained with the crime of a false oath,—another form of which is seen in the ancient superstition that the earth would eject the corpse of a criminal, and not allow it to remain quietly interred. . . .

Perhaps the most extensive instance of the application of this form of ordeal was that proposed when the sacred vessels were stolen from the cathedral church of Laon, as related by a contemporary. At a council convened on the subject, Master Anselm,

1. From Henry C. Lea, "Superstition and Force", p. 318; cited *ante*, § 2.

the most learned doctor of the diocese, suggested that, in imitation of the plan adopted by Joshua at Jericho, a young child should be tried by immersion in consecrated water. From each house of the parish which should be found guilty, another child should be chosen to undergo the same process. When the house of the criminal should thus be discovered, all its inmates should be submitted to the ordeal, and the author of the sacrilege would thus be revealed. This plan would have been adopted had not the frightened inhabitants rushed to the bishop and insisted that the experiment should commence with those whose access to the church gave them the best opportunity to perpetrate the theft. Six of these latter were accordingly selected, among whom was Anselm himself. While in prison awaiting his trial, he caused himself to be bound hand and foot and placed in a tub full of water, in which he sank satisfactorily to the bottom, and assured himself that he should escape. On the day of trial, in the presence of an immense crowd, in the Cathedral which was chosen as the place of judgment, the first prisoner sank, the second floated, the third sank, the fourth floated, the fifth sank, and Anselm, who was the sixth, notwithstanding his previous experiment, obstinately floated, and was condemned with his accomplices in spite of his earnest protestations of innocence.

Although the cold-water ordeal disappears from the statute-book in civil and in ordinary criminal actions together with its kindred modes of purgation, there was one class of cases in which it maintained its hold upon the popular faith to a much later period. These were the accusations of sorcery and witchcraft which form so strange a feature of mediaeval and modern society. . . . The crime was one so difficult to prove judicially, and the ordeal offered so ready and so satisfactory a solution to the doubts of timid and conscientious judges, that its resuscitation is not to be wondered at. The professed demonographers, Bodin, Binsfeld, Godelmann, and others, opposed its revival for various reasons, but still it did not lack defenders. . . .

In 1594, a more authoritative combatant entered the arena—Jacob Rickius, a learned jurisconsult of Cologne, who, as judge in the court of Bonn, had ample opportunity of considering the ques-

tion and of putting his convictions into practice. He describes vividly the perplexities of the judges hesitating between the enormity of the crime and the worthlessness of the evidence, and his elaborate discussions of all the arguments in favor of the ordeal may be condensed into this: that the offence is so difficult of proof that there is no other certain evidence than the ordeal; that without it we should be destitute of absolute proof, which would be an admission of the superiority of the Devil over God, and that anything would be preferable to such a conclusion. He states that he never administered it when the evidence without it was sufficient for conviction, nor when there was not enough other proof to justify the use of torture. . . . The learning displayed in his constant citations from the Scriptures, the Fathers, the Roman and the Canon Law, is in curious contrast with the fatuous cruelty of his acts and doctrines.



*Chapter 2*  
*ENGLAND*

## ENGLAND

## A. REGULAR COURTS

5. Wager of Law, Benefit of Clergy, and Trial by Jury, A.D. 1300.<sup>1</sup>

*Friar Roger Bacon and Signor Marco Polo Visit the  
London Courts.*

[The purporting narrator is a Friar of Croyland Abbey (his real name, Roger Bacon, that precocious scientist of the 1300s), who is showing the sights of London to a visiting oriental merchant (his real name, Marco Polo, the famous world-traveler, just come to England). After attending the election of a member of the Parliament, and a meeting of the Mayor and Aldermen in the Guild Hall, they come now to a session of the law-court, held in the same Hall.

Here they observe the procedure; and the narrative cleverly weaves into a single session two of the most characteristic procedures of the day, wager of law and trial by jury. The passages in parenthesis are interpolations by the learned historian to explain the significance of the several episodes which without explanation might not be understood.]

1. From Sir *Francis Palgrave*, "The Merchant and the Friar" (London, John W. Parker, 1837), p. 173. This writer, the most learned legal historian of his period, and author of "The Rise and Progress of the Commonwealth of England", seeks in this monograph, full of wit and wisdom, to portray some of the important institutions of the 1300s so as to give them life and reality for the modern reader. But being himself the "Keeper of the Records of the Treasury of Her Majesty's Exchequer", he insists (p. xx) that he has founded every part of his narrative on authentic records perused by him. "The portions of the monk's lucubrations relating to our parliamentary and legal constitutions receive most ample illustrations from the several collections of original records and other documents which I have edited. The memorable judgments given by the Court of Aldermen in the cases of *Rex v. Romford* and *Rex v. Lickpenny* . . . are in substance quite authentic; . . . in the ancient register of the city, marked with the letter G, you may at folios 133 and 138 peruse the very records of two such trials".

## Chapter 2

## A. REGULAR COURTS

5. *Wager of Law, Benefit of Clergy, and Trial by Jury, A. D. 1300.*  
*Friar Roger Bacon and Signor Marco Polo Visit the London Courts.*
6. *Richard de Anesty's Five-Year-Long Suit, A. D. 1158.*  
*To King and Pope o'er Land and Sea in Quest of Justice.*
7. *Trial by Battle in Queen Elizabeth's Time, A. D. 1571.*  
*The Court of King's Bench go to Tothill Fields to sit in Judgment.*

## B. SPECIAL COURTS

8. *The Court Baron.*  
*The Case of the Stolen Fish; and the Case of the Missing Mare.*
9. *The Court of Forestry.*  
*Troubles of a Forest Game-Warden in Feudal Days.*
10. *The Coroner's Court.*  
*Two Oxford Students Quarrel, with Dire Result.*
11. *The Court of Star Chamber.*  
*Brutal Night-Riders elude a Harassed Sheriff.*
12. *The Manx Deemster and the House of Keys.*  
*The House Sustains the Deemster's Judgment.*
13. *The Tribunal of the Scottish Border.*  
*An International Day of Truce, for Reciprocal Punishment of Wrongdoers.*
14. *The Court of King Henry VIII's Household Peace.*  
*How to Cut Off a Noble Culprit's Right Hand with Ceremonious Efficiency.*

Meanwhile, a great bustle had arisen in the Hall. It continued to increase. Marco and his companions looked round towards the hustings, and found, that whilst they were talking, not only had Sir William de Ormesby, the Chief Justice of the King's Bench, arrived; but the King's Commission had actually been read, without their hearing one word of it. Mayor and Aldermen, with the King's Justices, were sitting as a Court of oyer and terminer and gaol-delivery.

Andrew Horne [a famous lawyer], who was quite at home in the Guildhall, conducted his companions upon the hustings, just as the Sergeants were compelling by main force a manacled criminal to stand at the bar.

The malefactor had been apprehended in Cheap, in the very act of cutting a purse from the girdle of Sir John de Stapleford, Vicar-general of the Bishop of Winchester. (Cases of flagrant delict, according to our ancient common law, or, to speak more accurately, according to the law of all nations in the simpler stages of society, required no other trial than the publicity or incontrovertibleness of the fact, no further proof of the offence was needed, and no defence allowed. They proceeded by law in the same manner as the mob now do by impulse, when the pickpocket is dragged through a horsepond; or like the gardener thrashing the school-boy, whom he has caught in his apple-tree.) . . . According to these principles Sir William de Ormesby therefore intimated to the officers, that as they might—and, indeed, ought—to have struck off the head of the prisoner before the Conduit, it was unnecessary thus to have given the Court the trouble of passing judgment.

"Let him be hanged upon the elms at Tyburn,"—was forthwith pronounced as his doom. Pale and trembling, and suing for mercy, the wretch was taken from the bar, not indeed without exciting some suppressed feelings of compassion in the court. . . . Louder and louder became the cries of the miserable culprit as he receded from the judges; and just when the Sergeants were dragging him across the threshold, he clung to the

pillar which divided the portal, shrieking in a voice of agony which pierced through the hall, "I demand of Holy Church the benefit of my clergy!"—

Perhaps, in strictness, the time for claiming this privilege had gone by, but the officers halted with their prey: and one of the prothonotaries having hurried to them with a message from Chief Justice Ormesby, the thief was replaced at the bar. During the earlier portion of the proceedings, the kind-hearted Vicar-general had evidently been much grieved and troubled by his enforced participation in the condemnation of the criminal. Stepping forward, he now addressed the Court, and entreated permission, in the absence of the proper Ordinary, to try the validity of the claim.

Producing his breviary, he held the page close to the eyes of the kneeling prisoner; he inclined his ear. The bloodless lips of the ghastly man were seen to quiver.—"*Legit ut Clericus*, [He reads like a clerk]"—instantly exclaimed the Vicar-general; and this declaration at once delivered the felon from death, though not from captivity. . . .

Behold another criminal placed at the bar. "William of the Palace, thou art indicted as a felon, for that thou hast broken open and robbed the Treasury of our Lord the King at Westminster. How wilt thou be tried?" The culprit was about to speak; when Andrew Horne, who had suddenly determined to retain himself for the prisoner, loudly took up the word, and silencing William of the Palace by the wave of his hand, he exclaimed,—"*The culprit wages his law as a freeman of the City of London, as one of the burgesses, to whom it is granted by the Conqueror that they should be worth the same law as in the days of good Saint Edward. Therefore is he entitled to refute the accusation by the declaration of his friends. Seven shall be the Compurgators chosen and named by the prisoner himself according to our old Anglo-Saxon law. If they all concur in testifying his innocence—if their oath declares him guiltless,—he is quitted for ever of the transgression which the King has laid to his charge. This franchise of our City bars the plea of the Crown.*" . . . So did a shout of applause from the crowd testify the satisfaction with which the by-

standers heard this declaration of their City privileges. (This Anglo-Saxon law was a matter in which a great many of them took an interest by no means theoretical, since it afforded, could it be established, a comparatively easy mode of escaping the legal noose.)

. . . .

Andrew Horne's City law, however, was not allowed to pass unquestioned by the Court. "The right of compurgation, which you claim for the prisoner, is taken away by the implication arising from the tenor of the Assizes of Clarendon, reenacted at Northampton," sternly exclaimed the Chief Justice.

"Cry your mercy, my Lord," replied Andrew, with firm humility; "your objection, most humbly do I submit, is wholly nought. London is not specifically noticed in the Assize. The enactment is in general terms; and it is the franchise of the London citizens, that no statute affects their privileges, unless they be therein specially named."

"But the culprit, good Master Andrew," observed the Recorder—trying to trim his course accurately between the Chief Justice, to whom he looked up for promotion, and the Common Council, to whom he looked down for his salary—"must be a *full* Citizen, and not merely a nominal member of our community; unless he is actually resident, paying scot and bearing lot with the rest of the ward, he cannot claim these rights. I sincerely hope that the poor fellow at the Bar is duly qualified, and I should regret exceedingly if Master Chamberlain were compelled, in the exercise of his duty, to inform the Court that the name of William of the Palace doth not appear upon the Talliage roll."

This hint was not lost upon the Chief Justice. Search was made upon the Roll, and, as may be anticipated, the name of William of the Palace was absent; he had not been rated or assessed to the charge. The want of participation in the civic contribution deprived the culprit of the franchise of the civic community, and he was left to the common law.

"Culprit, how wilt thou defend thyself?" was the question now put by the Town-Clerk.

William of the Palace was about to answer,—he was small and debilitated, and sickly, yet hot and angry; so he began to pull at his glove, preparing for the battle ordeal, but before it was half drawn off, Master Andrew again stepped forward, and, speaking for the client upon whose business he had employed himself, said, "He puts himself upon the country."

"Sheriff! Is your inquest in Court?" said the Mayor.

"Yes, my Lord," replied the Sheriff, "and I am proud to say it will be an excellent jury for the Crown. I myself have picked and chosen every man on the panel. I have spoken to them all, and there is not one whom I have not examined carefully, not only as to his knowledge of the offence wherewith the prisoner stands charged; but of all the circumstances from which his guilt can be collected, suspected, or inferred. All the jurors are acquainted with him, eight out of the twelve have often been known to declare, upon their troth, that they were sure one day he would come to the gallows, and the remainder are fully of opinion that he deserves the halter. My Lord, I should ill have performed my duty, if I had allowed my bailiffs to summon the jury at hap-hazard, and without previously ascertaining the extent of their testimony. Some, perhaps, know more, and some less, but the least-informed of them have taken great pains to go up and down in every hole and corner of Westminster, they and their wives: and to learn all they could hear, concerning his past and present life and conversation. Never had any culprit a better chance of having a fair trial."

("Trial by jury," has most singularly retained its original form, wholly changing its original nature. Until the reign of the Tudors, the Jury, instead of being the peers of the accused, by whom his guilt was to be tried,—a Court before whom the validity of the evidence given by the witnesses was to be investigated,—were the *sworn* witnesses themselves,—and their "true saying", the *veredictum*, or verdict, was the summing-up of their own testimony. Hence it was the duty of the Sheriff to learn their previous knowledge of the facts, and to summon those by whom, in the words of the process yet in use, "the truth could be better known." . . .

Thus, then, was the Jury formed. The jurors were brought before the Judge by the Sheriff upon the same principle that the attorney now collects his witnesses in order to obtain a conviction. He got together those who, in his opinion, could best make out the case. And it is to be feared that he was not always over scrupulous as to the means by which that end was to be attained.)

William of the Palace, the prisoner, not having challenged any of the panel, they were duly sworn to say the truth, and after retiring for a few minutes, delivered their *vere-dictum* by their foreman in the following form:

"As soon as the robbery was bruited about, and even before the Sergeants-at-Arms were empowered to make inquiry for the offenders, William of the Palace quitted Westminster, and repaired into this City of London. Furthermore, when his house was searched by the Sergeants-at-Arms, there was found hid in the dovecote a golden mazer, and a broken reliquary in the shape of a cross, both of which, as we have been told, by the Usher of the Deputy Chamberlain of the Exchequer, came out of the King's Treasury, in the Cloister of the Abbey of Westminster, hard by the Chapter-house of the said Abbey." . . . "Furthermore," continued the Foreman of the Jury "the Culprit is idle; he is a glutton; he is a drunkard; he borroweth and payeth not; he keepeth company with suspicious persons; he diceth; he swear-eth; he haunteth taverns; he rioteth; he liveth much above his means; he hath deserted his lawful wife, and now consorteth with his leman Eleanor, the daughter of Richard the barber, dwelling in the lane of Guthrun the Dane, otherwise Gutter-lane, in the ward of Cheap. And therefore we say with one accord,—partly knowing these matters of our knowledge respectively, partly as we have heard from our companions, and partly from other persons of good credit,—that the prisoner at the bar is guilty of the robbery of the King's Treasury." . . .

"Culprit," said Sir William de Ormesby, "what hast thou to allege, that judgment be not passed upon thee?"

"That the indictment is wholly void," said Andrew [the counsel], "inasmuch as the prisoner hath been forced, by artifice and decep-

tion, from the Sanctuary of the Blackfriars,"—a franchise then wholly, and still partially, exempted from the jurisdiction of the City.

The assertion thus made was substantially proved by the Sacristan. . . . And after some discussion, Sir William de Ormesby reluctantly admitted that, as a sanctuary-man, the prisoner was to be permitted to purchase his exemption from capital punishment, by submitting to perpetual banishment.

The last defence raised by Andrew Horne was therefore so far effectual, that, like the plea of clergy, it saved the life of his client. Bareheaded, barefooted, ungirt, and a white cross placed in his hand, he was sent forth on his painful pilgrimage. Neither turning to the right or to the left, he proceeded to Dover, as the nearest sea-port, and there embarking, he abjured the realm for ever.

Other felonies were then tried; and this portion of the Calendar being cleared, the Chief Justice arose and left the Mayor and Aldermen to dispose of the minor delinquents.

An individual was now, however, brought to the bar, who scarcely appeared to belong to this last-mentioned class, for, as soon as he "caught the eye" of the Mayor, the worthy Magistrate rose up from his seat, and greeted him with the loud execration,—“Here he is, here is the wretch who hath sought to poison the whole city!” This fearful accusation, however, was reduced into a smaller compass by the indictment. Divesting the crime of the attributes which it had received from the glowing fancy and poetical imagery of the Lord Mayor, Stephen Lickpenny was simply charged with having sold rabbits in a state “abominable to man, and unfit for human food.”

“Bring them before the Court,” exclaimed the Town-Clerk.

Placed upon the bar, an odour spread around, which indisputably notified the presence of the rabbits to the assembled olfactory.

“Is it your Worships’ pleasure, that Lickpenny be allowed to put himself upon the Country?” said the Crier.

“Hand up the rabbits to the Court,” spake the Lord Mayor.

No sooner said than done. Almost before the command was completely given, the Crier, with dutiful alacrity, had brought the long-since murdered animals in contact with the nose of the junior Alderman, who started back, with a loud "Paah!" The rabbits continuing their gyration, the next Alderman in seniority, who had already huddled up his gown before his mouth and nostrils, signed to the trusty functionary to pass on; when the Lord Mayor, who, if he had been as blind as love or justice, would have been fully aware of the distant approach of the savoury cates, rose, apparently in a state of much excitement, and exclaimed,—“What need have we of inquest or jury, or of further testimony, beyond that which our senses thus supply? Let Lickpenny stand in the pillory, with the rabbits hung around his neck.” And ruthless Lickpenny was removed from the bar, where his place was immediately supplied by a brother in the trade, one Romford.

Substitute pigeons for the fourfooted stock of the poulterer, and you have the accusation as before; and, as before, the birds made the circuit of the bench of Aldermen. This case, however, was not so clear, and, for the credit of the Court, it was requisite to use a sound discretion.

Some of the Aldermen snorted and shook their heads; others appeared impassive; whilst one actually snuffed and snuffed again. The Aldermen retired to a small adjoining chamber, with the pigeons. They closed the door; and after one hour and three quarters' deliberation, they returned into the Guildhall.

Addressing Peter Romford, the Lord Mayor told him, that as one of the most experienced Aldermen could not satisfy himself that the birds came within the compass of the indictment, the great majority of the Court, though they were of a very different opinion, considering the great difficulty and importance of the case, would allow him the benefit of a Jury of Cooks. And they were forthwith summoned from Eastcheap by the Town-Crier.

Shortly afterwards the twelve Cooks entered the Hall, with much decorum and gravity; the boards creaked beneath their tread. Being duly charged, they retired with the dubious victual; and, after some discussion, the foreman, Stephen Towzle, pronounced, on be-

half of himself and his fellow-jurors,—“That the pigeons were not abominable, or unfit for human food; provided they were duly seasoned and baked in a pie.”

The delivery of this special verdict was immediately a signal for a battle between the Town-Clerk and Master Andrew, who, as usual, had retained himself for the prisoner. Andrew contended that a “negative qualified” was equivalent to an acquittal; the Town-Clerk, with equal vehemence, maintained it to be a declaration of the guilt of the party. But the Mayor, with much sound sense, ended the matter, by rising and breaking up the Court, leaving the poulterer to go where he pleased, and the pigeons to go wherever it should please the Jury to convey them.

Bearing off the spoil, the Cooks accordingly departed. Operated upon by the skill of these predecessors of Ude and Jarrin, the birds quickly found a gastronomic purchaser;—and, strange to say, in the person of the very Alderman who had laboured most strenuously to procure a summary conviction.

## 6. Richard de Anesty's Five-Year-Long Suit, A.D. 1158.<sup>1</sup>

### *To King and Pope o'er Land and Sea in Quest of Justice.*

[The following unique narrative recounts the toilsome and long-drawn-out adventures of an English gentleman of good family, who in the reign of King Henry II persisted for five long years in vindicating his claim to an inheritance,—using indefatigably every expedient rendered necessary by the procedure of the times, and finally obtaining redress from the King himself. The repeated delays, caused by technical requirements of jurisdiction, give point to the pledge exacted by the Barons from King John a few years later, A.D. 1215, “To no one will we deny *or delay* right and justice”. And the story of Anesty's tedious and baffling quest (which might be incredible if it were not authenticated) emphasizes the perpetual warning taught by History, that Justice, unless constantly watched and corrected, tends ever “to drag her slow feet along.”

1. From *Richard de Anesty's* “Narrative of his Suit,” printed in Sir Francis Palgrave, “The Rise and Progress of the English Commonwealth” (London, Murray, 1832), Part II, p. ix.

The facts involved in his claim, briefly stated, were as follows: Richard is the nephew of William de Sackville, being son of the sister of William his uncle, who died without lawful issue, leaving a valuable landed estate; Richard thus is the would-be heir. But one Mabel de Francheville claims the estate as the lawful issue of William's marriage with one Adeliza. However, before this marriage William had been betrothed to one Albreda, and the question thus arises whether by the Canon law the marriage to Adeliza was void, being in breach of the betrothal, and thus Mabel was illegitimate. A divorce from Adeliza had in fact been granted to William on that ground.

As Mabel is in possession of the estate, Richard sues Mabel and her husband for the estate in the King's Court. But since questions of marriage and divorce lie within the jurisdiction of the Church Courts, the King's Court refers this issue to the determination of the Church Court, of which at that period, of course, the Pope at Rome was the supreme judge.

The plaintiff's long adventures in quest of justice therefore take him, not only all over England, but even to Rome; for, as pointed out by the learned historian Palgrave, who unearthed this quaint record, "this most singular narrative has afforded us so complete a development of the manner in which a plaintiff was compelled to 'follow his suit in person', that no language except his own could afford any adequate idea of the spirit and practice of our ancient judicature".]

These are the costs and charges which I, Richard de Anesty, bestowed in recovering the land of William, my Uncle, to wit:

In the first place [1158] I sent a certain man of mine own into Normandy, for the King's writ, whereby I impleaded my adversaries, and he spent  $\frac{1}{2}$  a mark in that journey. And when my messenger brought me the writ, as soon as I received the writ, I proceeded to Sarum [Salisbury] with the same, in order that it might be returned under the Queen's seal; and in that journey I spent 2 marks of silver.

And when I came back, I heard that Ralph Brito was about to cross the water: so I followed him to Southampton, for the sake of

speaking to him, in order that he might purchase for me the King's writ, addressed to the Archbishop, because I knew that the plea would be removed into the Archbishop's court; and in that journey I spent 22 shillings and 7 pence, and I lost a palfrey which I had bought for 15 shillings.

And having returned from thence with the Queen's writ, I went to Ongar, and delivered the writ to Richard de Luci [a King's Judge], who having seen and heard the same, gave me a day for pleading at Northampton, on the eve of St. Andrew [29 Nov. 1158]; and within that term I sent Nicholas, my clerk, for Geoffrey de Tregoz and for Albreda, his sister (to wit, she who had been my Uncle's wife), whom he found at Berney, in Norfolk; and in that journey he spent 15 shillings and lost one pack-horse, which I had bought for 9 shillings.

And when he came back, I went to Northampton to open my pleadings, with my friends and my helpers; and in that journey I spent 54 shillings.

Hence Richard de Lucy gave me another day at Southampton, on the 15th day [13 Dec. 1158]: and in that journey I spent 57 shillings; and in that same journey I lost one pack-horse worth 12 shillings.

Afterwards Ralph Brito came from Normandy, and he brought me the King's writ, whereby the plea was removed into the Archbishop's court, and I carried the writ to Archbishop Theobald, whom I found at Winchester; and in that journey I spent 25 shillings and 4 pence.

And then the Archbishop gave me a day on the feast of St. Vincent [22 Jan. 1159], and that plea was held at Lambeth.

And thence he gave me a day on the feast of St. Valentine the martyr [14 Feb. 1159]; and in that journey I spent 8 shillings and 6 pence; and that plea was held at Maidstone.

From thence he gave me a day on the feast of St. Perpetua and St. Felicity [7 March 1159]: and in the mean while I went to the Bishop of Winchester, to speak with him, in order that he might certify the divorce which had taken place before him in the Synod



at London; and in that journey I spent 1 mark of silver. And having obtained the Bishop's certificate, I appeared on my before mentioned day, prepared for my pleadings, and that plea was held at Lambeth; and there I spent 37 shillings and 6 pence.

From thence he gave me a day on the Monday next after Laetare-Jerusalem [23 March Mid-lent-Sunday, 1159]; and in the mean while I went for Master Ambrose, who was then with the Abbot of St. Alban's in Norfolk: and in that journey I spent 9 shillings and 4 pence; and I sent Sampson, my chaplain, unto Buckingham for Master Petrus de Melide; and in that journey he lost his palfrey, which I made good to him for 1 mark of silver, and he spent 7 shillings there.

Having thus got at the aforesaid Clerks, I kept my day with my helpers at London; and, in that journey, I spent 5 marks of silver.

Thence the Archbishop gave me a day on Quasi-modo-geniti Sunday [19 April, the first Sunday after Easter, 1159], and in the mean while, I sent John, my brother, beyond the seas, to the King's Court, because it was told to me that my adversaries had purchased the King's Writ exempting them from pleading until the King should return to England; and therefore I sent my brother for another Writ, lest my pleadings should be stayed on account of the Writ obtained by my adversaries; and in that journey my Brother spent 3 marks of silver.

And in the mean while I myself went to Chichester, to speak to Bishop Hilary, in order that he might give evidence of the divorce which had been decreed in his presence before my Lord of Winchester, in the Synod at London, and I received his evidence, viz. the letters which he sent to the Archbishop testifying the divorce; and in that journey I spent 14 shillings and 4 pence.

I kept my day at London with my Clerks, and my Witnesses, and my Friends, and my Helpers, and there I remained for four days, pleading every day; and in that journey I spent 103 shillings.

Thence he gave me a day on Rogation day [18th May, 1159]: and when I kept my day at Canterbury, my adversaries said that they would not plead, on account of the summons of the King's

army for [the expedition against] Toulouse; and in this journey I spent 38 shillings, and departed without a day.

And I followed the King and found him at Avinlarium; and in this journey did I tarry for thirteen weeks before I could obtain the King's Writ for proceeding with the pleadings, and in that journey I spent 4 pounds of silver and 10 shillings.

Having purchased the King's Writ, I returned: and having found the Archbishop at Mortlake, I delivered the King's Writ to him, and he gave me a day on the feast of St. Crispin and St. Crispianus [25th Oct. 1159], on which day I came to Canterbury; and in that journey I spent 24 shillings and 6 pence.

And from thence he gave me a day on the octaves of St. Martin [18th Nov. 1159], and on that day I came to Canterbury; and in that journey, I spent 29 shillings, all but 2 pence.

From thence, my Lord of Canterbury gave me a day on the feast of St. Lucia the Virgin [13th Dec. 1159], and in the mean while I sent Master Sampson, my Chaplain, to Lincoln, for Master Peter, and in that journey I spent ½ a mark; and when the day of my plea arrived, I could not appear in consequence of my illness, but I sent my essoigners [excusers], who essoigned me at Canterbury; and in that journey I spent 10 shillings.

And from thence a day was given me on the feast of St. Fabian and St. Sebastian [20th Jan. 1160], and on that day I came to London where my Lord of Canterbury was; and in that journey I spent 22 shillings and 8 pence.

From thence he gave me a day on the feast of St. Scolastica the Virgin [10th Feb. 1160], and I kept my day at Canterbury; and in that journey I spent 37 shillings and 6 pence.

And from thence he gave me a day on Laetare-Jerusalem [6th March, 1160], and I kept my day at London; and in that journey I spent 43 shillings.

From thence he gave me a day on Misericordia-Domini Sunday [10th April, the second Sunday after Easter, 1160]; and in the mean while I sent Robertus de Furn', and Richard de Marci, for Godfrey de Marci; in which journey I spent 10 shillings, and

Robert de Furn' lost a palfrey worth 2 marks; and I myself went to the Bishop of Winchester, in order that I might obtain a more precise certificate of the divorce which had been decreed; and in that journey I spent 34 shillings and 5 pence, and I found the Bishop at Fareham, near Portsmouth; and from thence I brought back with me Master Giordano Fantasma, and Nicholas de Chandos, in order that they might testify viva voce, what the Bishop had already testified by his Writ.

And I kept my day, prepared for my pleadings at London; and there I spent 13 shillings and 4 pence.

From thence the Archbishop gave me a day on the Clause of Pentecost [either the Saturday in Whitsun week, or Trinity-Sunday, 21 or 22 May, 1160], and in the mean while, I myself went to the Bishop of Lincoln for Master Peter, who was then with him at Stafford; and in that journey I spent 22 shillings and 7 pence, and I sent Sampson, my Chaplain, for Master Stephen de Binham, whom he found at Norwich; in which journey he spent 9 shillings.

And thence I kept my day at Canterbury, prepared for pleading, with my Clerks, and my witnesses, and my friends, and my helpers; in which journey I spent 4 pounds and 12 shillings, because we were pleading there for two days.

From thence, he gave me a day on the octaves of St. Peter and St. Paul the Apostles [5th July, 1160]; and I kept my day at Wingham; and in that journey I spent 27 shillings and 2 pence.

From thence, he gave me a day on the Feast of St. Sixtus [6th Aug. 1160]; and I kept my day at Lambeth; in which journey I spent 18 shillings and 2 pence.

From thence, he gave me a day on the decollation of St. John the Baptist [29th Aug. 1160]; and then I kept my day at Canterbury; and in that journey I spent 23 shillings.

From thence he gave me a day on the feast of St. Luke the Evangelist [18th Oct. 1160].

In the mean while, I crossed the water, in order that I might solicit a license from our Lord the King, to appeal to Rome. And in that journey, I lost a palfrey which I had bought for 16 shillings; and I spent 6 marks and 5 shillings.

And, having received the license, I appealed to Rome, praying that a day might be given me there on Laetare-Jerusalem [3d March, 1161]; and in that plea I spent 16 shillings and 8 pence.

After this I sued for the Archbishop's writ of appeal; but he refused to issue it immediately on the spot, and he gave me a day for receiving it at Canterbury; at which day I came and received my writ, but without seal, in order that I might shew the same to my Advocates, and obtain their opinion whether it was according to law; in which journey I spent 15 shillings.

And afterwards I sent that same writ by Sampson, my chaplain, to Lincoln, to shew it to Master Peter de Melide; and in that journey he spent 5 shillings and 6 pence. And afterwards I sent the same writ to Master Ambrose, whom the messenger found at Binham; in which journey he spent 18 shillings.

And the writ being corrected by my advocates, I carried the same back again to Canterbury, in order that it might be sealed; and having seen the writ, they refused to seal such a one, but they gave me another without seal.

Hence, having received the writ, I went to shew the same to the Bishop of Chichester; and having heard his advice, I returned; in which journeys I spent 2 marks of silver.

And then I sent the writ again by Sampson, my chaplain, to Master Peter; in which journey he spent  $\frac{1}{2}$  a mark of silver: I then sent the same writ again to Master Ambrose, at St. Alban's; and, their advice being received, and the writ corrected, I went to the Archbishop at Wingham, and there my writ was sealed; and in this journey I spent 10 shillings.

And when I came back, I sent John, my brother, to Winchester, in order that he might purchase the Bishop's writ certifying the divorce to the Holy Father; and I myself went to the Bishop of Chichester, whom I found at Salisbury, in order that he might certify the divorce by his writ, addressed to the Holy Father in the same manner as he had done before to the Archbishop: and in that journey I spent 17 shillings, and John spent 9 shillings.

And a second time and a third time did I send my brother to Winchester before I could have an available writ; and in those two journeys he spent 19 shillings.

Thereafter [about March, 1161] I got my clerks ready, and sent them to Rome,—to wit, Sampson, my chaplain, and Master Peter de Littlebury, and one man to attend them, in whose outfit, to wit, in horses and in clothing, I spent 5 marks of silver; and in that journey to Rome they spent 25 marks of silver. And when they came back, they said that they had spent 40 shillings beyond what I had supplied them with, and which had been lent to them by a certain clerk of the Bishop of Lincoln who accompanied them, and which I repaid to him.

Having received the brief of our Lord the Pope, I carried the same to the Bishop of Chichester and the Abbot of Westminster, to whom the same was directed, in order that my plea might be brought into their court; and in these journeys I spent 18 shillings and 9 pence.

After they had seen the Apostolical precept, they fixed a day for me to plead at Westminster, in eight days of the feast of St. Michael [6 Oct. 1161]; and I kept my day, with my advocates, and my friends, and my witnesses, and my helpers; and there we tarried three days before we pleaded, on account of the King's commands, about which the Abbot and the Bishop were employed; and in that journey I spent 4 pounds and 10 shillings.

From thence, they gave me a day in eight days of St. Martin [18 Nov. 1161]. In the mean while I sent John, my brother, for Godfrey de Marci, in order that he might attend as my witness: and he could not come, because he was ill, but he sent his son in his place; and in that journey John, my brother, lost a palfrey which he had bought for 15 shillings, and he spent 7 shillings and 6 pence.

On the appointed day, I came to London, prepared and ready for pleading, because I thought I should then obtain my judgment; and there we tarried five days, and there I spent 104 shillings.

And then my adversaries appealed to the presence of the Holy Father himself, [such appeal to be heard] on the feast of St. Luke

the Evangelist [16 Oct. 1162]; and I requested the instrument of appeal, and they gave me a day at Oxford on the feast of St. Andrew [30 Nov. 1161]; and I kept my day; and I tarried there for nine days before I could obtain my instrument; and there I spent 34 shillings.

And having received the writ, but without seal, I carried the same to Master Peter, at Lincoln, in order that he might correct it; and in that journey I spent 1 mark of silver.

The writ being corrected, I carried the same to the Bishop of Chichester at Winchester, on the octaves of the Epiphany [13 Jan. 1162], in order that it might be sealed there; and the Bishop would not seal it, because the Abbot of Westminster was not there: and in this journey I spent 2 marks of silver: but afterwards it was sealed at Westminster on Laetare-Jerusalem [18 March 1162], where I spent 23 shillings and 4 pence.

Afterwards, I went to the Archbishop of York for his writ deprecatory, to be addressed to the Holy Father, and to the Bishop of Durham for his writ to the Holy Father and the Cardinals; and I found them both at York; and I returned to the Bishop of Lincoln for his writ, addressed likewise to the Holy Father and the Cardinals; and in that journey I spent 48 shillings.

And when I returned, I proceeded to the Bishop of Winchester for his writ; and I found him at Glastonbury; and there I spent 32 shillings.

Afterwards, when the time of appealing drew nigh, having prepared my Clerks, I sent them to the Court of Rome, where they tarried sixty-two days before they could have my judgment [Oct. Nov. & Dec. 1162]; and there they spent 11 marks of silver.

And when they came back, they brought a sentence [confirming the previous judgment of divorce on the ground] of adultery. One instrument was directed to the Archbishop, another to Richard de Lucy, and the third to me: and with these instruments I proceeded to my Lord Richard de Lucy, whom I found at Rumsey; and there we awaited the return of the King, who was about to come back from Normandy.

Thence I followed the Court for three weeks before I could make fine with the King; and in that journey I spent 5 marks of silver. And because the King was vexed on account of his Holiness not having directed any brief to him, I sent a messenger on the following day to the Holy Father, for a writ directed to the King (which my messenger afterwards brought to me on the clause of Easter, at Windsor); and in that journey the messenger spent 50 shillings.

After I had fined with the King, my Lord Richard de Lucy, by the King's precept, gave me a day for pleading at London at mid-lent [3 March 1163]; and there was then a Council; and I came there with my friends and my helpers; and because he could not attend to this plea on account of the King's business, I tarried there for four days, and there I spent 50 shillings.

From thence, he gave me a day on the clause of Easter [31 March 1163]; and then the King and my Lord Richard de Lucy were at Windsor; and at that day I came with my friends and my helpers, as many as I could have; and in the mean while I sent my brother for Ranulphus de Glanville, whereby he lost a palfrey, which he had bought for 20 shillings, and he spent  $\frac{1}{2}$  a mark in this journey; and because my Lord Richard de Lucy could not attend to this plea on account of the plea of Henry de Essex, the judgment was postponed from day to day until the King should come to Reading.

And at Reading, in like manner, it was postponed from day to day until he should come to Walingford; and in that journey I spent 6 pounds and 5 shillings.

And from thence, because my Lord Richard was going with the King to Wales, he removed my plea into the court of the Earl of Leicester at London; and there I came; and in that journey I spent 35 shillings and 7 pence; and because I could not get on at all with my plea, I sent to my Lord Richard, in Wales, to the end that he might order that my plea should not be delayed; and then by his writ he ordered Ogerus Dapifer and Ralph Brito that without delay they should do justice to me: and they gave me a day at London; and that messenger spent 5 shillings.

I kept my day therefore with my friends and my helpers; when I spent 27 shillings and 4 pence.

From thence, my adversaries were summoned by the King's writ and also by my Lord Richard's writ, that they should come before the King; and we came before the King at Woodstock, and there we remained for eight days.

And at last, thanks to our Lord the King, and by judgment of his court, *my uncle's land was adjudged to me!* And there I spent 7 pounds and 10 shillings.

## 7. Trial by Battle A.D. 1571 in Queen Elizabeth's Day.<sup>1</sup>

*The Court of King's Bench go to Tothill Field in Westminster to sit in Judgment.*

[Trial by battle, as a procedure demandable to vindicate title to real property, was once more (after the present case) demanded and allowed in 1638 (though no battle eventuated); and in 1818 was again demanded and allowed in an action for homicide (Ashford v. Thornton, 1 Barnewall & Alderson 457), though again no battle eventuated. The notoriety and the anachronism of the latter case drew public attention, and Parliament acted by statute in 1819 to abolish this legal anomaly.]

Trinity Term, 13 Queen Elizabeth. *Lowe and Kyme against Paramour.*

In a writ of right the tenant chose trial by battle; but when every thing was prepared and performed, at the day and place appointed for the battle, the demandants being solemnly called made default, whereupon final judgment was given against them.

One Chevin seised of the land in demand in the island of Hartey, in the county of Kent, sold the land to Paramour, and for the assurance levied a fine to him; the conusance of which fine was taken before Sir Robert Brook, Chief Justice of the Bench. And because he doubted of the age of Chevin, he took certain examina-

1. From Sir James Dyer, Chief Justice of the Common Pleas, "Reports of Cases", etc., ed. John Vaillant, London, 1794, vol. III, p. 301a.

tions &c. by which he appeared to be of full age, as appears from the paper note of the fine ('ut asseritur per Manwood').

And in the same Term that the fine was levied, Chevin brought his writ of error, and assigned the error in Banco Regis on his non-age [infancy]; and upon that had a 'scire facias' to the sheriff of Kent against Paramour the conusee and terretenant, upon which a 'nihil habet nec est inventus' &c.

And upon this return the Court proceeded upon the examination of the error; and, as well by the inspection of the person of the plaintiff as by the testimony of four lawful and trusty men, the Court adjudged him within age. And in the next Term the fine was reversed for this cause. And afterwards, at the full age of Chevin, he sold the land to Lowe and Kyme; and they by feoffment of Chevin were put into possession; but Paramour would not quit, but continued his possession. And by suit in the Chancery, commenced by Paramour, they went to issue upon the age of Chevin &c. And the age of twenty-one years was proved by divers witnesses at the time of the fine levied; the depositions of whom were exemplified.

And afterwards Lowe and Kyme brought a writ of entry 'sur disseisin', in the nature of assise, against Paramour, who pleaded 'non disseisivit' &c. And these matters were given in evidence to the jury in the Bench, who looked more to the depositions taken in the Chancery, than to the reversal of the fine in Banco Regis and found for Paramour, 'scilicet', that he did not disseise, contrary to the opinion of the Court; wherefore judgment was given that the plaintiffs take nothing by their writ &c. Whereby they were barred, and brought attain against Paramour and the petit jury. And although all these matters were declared in the Bench to the grand jury, they affirmed the first verdict: but it was besides given in evidence, that notwithstanding the nonage the land was gavel-kind, and might be sold by the owner at the age of sixteen years, wherefore &c. So the first verdict was affirmed, and the demandants barred in the attain.

And upon this the demandants brought a writ of right, and counted upon their own seisin in the time of the King and Queen,

Philip and Mary, &c. And Paramour chose the trial by battle, and his champion was one George Thorne; and the demandants 'e contra', and their champion was one Henry Nailer, a master of defence. And the Court awarded the battle; and the champions were by mainprise and sworn ('quaere' the form of the oath) to perform the battle at Tothill, in Westminster, on the Monday next after the morrow of the Trinity, which was the first day after the Utas of the Term, and the same day given to the parties.

At which day and place a list was made in an even and level piece of ground, set out square, scilicet, sixty feet on each side due East, West, North, and South, and a place or seat for the Judges of the Bench was made without and above the lists, and covered with the furniture of the same Bench in Westminster Hall, and a bar made there for the Serjeants at law. And about the tenth hour of the same day, three Justices of the Bench, scilicet, Dyer, Weston, and Harper, Welshe being absent on account of sickness, repaired to the place in their robes of scarlet, with the appurtenances and coifs; and the Serjeants also.

And there public proclamation being three times made with an Oyes, the demandants first were solemnly called, and did not come.

After which the mainpernors of the champions were called, to produce the champion of the demandants first, who came into the place apparelled in red sandals over armour of leather, bare-legged from the knee downward, and bare-headed, and bare arms to the elbow, being brought in by the hand of a Knight, namely, Sir Jerome Bowes, who carried a red baston of an ell long, tipped with horn, and a Yeoman carrying a target made of double leather. And they were brought in at the north side of the lists, and went about the side of the lists until the midst of the lists, and then came towards the bar before the Justices with three solemn congies [bows], and there was he made to stand at the south side of the place, being the right side of the Court.

And after that, the other champion was brought in like manner at the south side of the lists, with like congies &c., by the hands of

Sir Henry Cheney, Knight &c. and was set on the north side of the bar; and two Serjeants being of counsel of each party in the midst between them.

This done the demandant was solemnly called again, and appeared not, but made default; upon which default, Barham, Serjeant for the tenant, prayed the Court to record the nonsuit; which was done.

And then Dyer, Chief Justice, reciting the writ, count, and issue, joined upon battle, and the oath of the champions to perform it, and the fixing of the day and place, gave final judgment against the demandants, and that the tenant should hold the land to him and his heirs for ever, quit of the said demandants and their heirs for ever; and the demandants and their pledges to prosecute, in the Queen's mercy &c.

And then solemn proclamation was made, that the champions and all others there present (who were by estimation above four thousand persons) should depart, every man in the peace of God and the Queen. And they did so, 'cum magno clamore,' Vivat Regina.

## B. SPECIAL COURTS

### 8. The Court Baron.<sup>1</sup>

*The Case of the Stolen Fish; and the Case of the Missing Mare.*

[Various men of rank—earls, barons, knights, bishops, abbots, etc.—might have a franchise to hold court over the inhabitants of their lands, for keeping law and order, enforcing the diverse local customs, and disposing of petty disputes and offences.

The Court Baron was held by the Seneschal, or Steward, of the barony, assisted by bailiffs and clerks. Records were fully and

1. "The Court Baron: being Precedents for Use in Seignorial and Other Local Courts", ed. *Frederic William Maitland* and *William Paley Baildon* Selden Society's Publications, vol. 4, 1890, Cases Nos. 35 and 59, pp. 54, 62.

faithfully kept. Handbooks of guidance were available, for the use of stewards, clerks, and pleaders. In the book here quoted, dating about A.D. 1300, sample cases are given in full,—not actual cases, but some 60 typical cases of all sorts, constructed from the author's observation of actual cases.

Two of them are as follows, dealing with "persons not accused by any man save the lord", i. e. what would today be called criminal cases:]

#### *The Case of the Stolen Fish*

Walter of the Moor, thou art attached to answer in this court wherefore by night and against the lord's peace thou didst enter the preserve of the lord and didst carry off at thy will divers manner of fish [and didst make largess of it by gift and sale]. How wilt thou acquit thyself or make amends? For know this, that were anyone to prosecute thee, thou wouldest be in peril of life and member; so be advised. . . .

Sir, by thy leave I will imparl. Then afterwards he speaks thus:—Sir, for God's sake do not take it ill of me if I tell thee the truth, how I went the other evening along the bank of this pond and looked at the fish which were playing in the water, so beautiful and so bright, and for the great desire that I had for a tench I laid me down on the bank and just with my hands quite simply, and without any other device, I caught that tench and carried it off. And now I will tell thee the cause of my covetousness and my desire; my dear wife had lain abed a right full month, as my neighbours who are here know, and she could never eat or drink anything to her liking, and for the great desire that she had to eat a tench I went to the bank of the pond to take just one tench; and that never other fish from the pond did I take, ready am I to do [by way of proof] whatever thou shalt award me.

W[illiam], saith the steward, at least thou hast confessed in this court a tench taken and carried away in other wise than it should have been, for thou mightest have come by it in fairer

fashion. Therefore we tell thee that thou art in the lord's mercy, and besides this thou must wage us a law six-handed<sup>2</sup> that thou didst not take at that or any other time any other manner of fish.

[Wm] As your honour pleases.

*The Case of the Stolen Mare*

Bailiff!

Sir.

Let the prisoners come before us.

That will I sir. Lo! they are here.

Bailiff.

Sir.

For what cause was this man taken?

Sir, for a mare which he took in the field of C. in other manner than he ought.

What is thy name?

Sir, my name is W[illiam].

William, thou art taken and attached in this court for a mare, which is here present, which thou art said to have taken larcenously in the field of C. How wilt thou acquit thyself of this larceny and all others?

Sir, if any man will sue against me for larceny or any other thing that is against the peace of the king and his crown, I am ready to defend myself by my body that I am good and lawful.

W[illiam], now answer me by what device thou camest by this mare; for at least thou canst not deny that she was found with thee, and that thou didst avow her for thine own.

Sir, I disavow this mare, and never saw I her until now.

Then, W[illiam], thou canst right boldly put thyself upon the good folk of this vill that never thou didst steal her.

Nay, sir, for these men have their hearts big against me and hate me much because of this ill report which is surmised against me.

Thinkest thou, W[illiam], that there be any who would commend his body and soul to the devil for thee or for love or for

2. I. e. bring six oath-helpers, or compurgators, to clear him.

hatred of thee? Nay verily, they are good folk and lawful, and thou canst oust from among them all those whom thou suspectest of desiring thy condemnation. But do thou what is right and have God before thine eyes and confess the truth of this thing and the other things that thou hast done, and give not thyself wholly to the enticement of the devil, but confess the truth and thou shalt find us the more merciful.

Sir, in God's name have pity of me, and I will confess to thee the truth, and I will put me wholly upon thy loyalty.

William, by my loyalty thou shalt have naught but justice! Say therefore what thou wilt, and conceal naught.

Sir, my great poverty, and my great neediness and the enticement of the devil made me take this mare larcenously, and often have they made me do other things that I ought not to have done.

God pardon thee! (saith the steward). W[illiam], at least thou hast confessed in this court that larcenously thou tookest this mare and hast done many other ill deeds; now name some of thy fellows, for it cannot be but that thou hadst fellowship in thy evil deeds.

Of a truth, sir, never had I companion in my evil deeds save only the fiend.

W[illiam], wilt thou say or confess aught else?

Nay, sir.

Bailiff.

Sir.

Take him away, and let him have a priest.

9. The Court of Forestry.<sup>1</sup>

*Troubles of a Forest Game-Warden in Feudal Days.*

Certain Inquisitions Concerning the Venison in the Forest of Rockingham in the Time of William of Northampton.

It happened on the Wednesday next after the feast of St. Michael in the same year that James of Thurlbear, Thomas of

1. From "Select Pleas of the Forest", ed. G. J. Turner, Selden Society's Publications, 1901, vol. XIII, pp. 79, 99.

Spain, and Robert of Wick, the hunters of Sir Geoffrey of Langley, the justice of the forest, and others with them went into the Farming wood of Brigstock after dinner and met certain persons doing evil in the forest with bows and arrows, estimated at the number of twelve. And they led three dogs in a leach, of which one was black, a second red with ears erect, and the third ticked with white and black. And the huntsmen forthwith hailed them; and they shot arrows at one another. And two of the evil doers came out of their band and seized Robert of Wick, as he stood at his tree; and when the hunters could not resist them on account of their number, they went away.

Afterwards on the Saturday next after the feast of St. Denis in the same year, the foresters and verderers, to wit, Sirs Maurice Daundelay, John Lovet, Richard of Aldwinkle, and Hugh of Cransley, and the townships neighbouring thereto, to wit, Brigstock, Stanion, Weldon, Benefield, Upthorp, Churchfield and Lyveden, were assembled before Sir Hugh of Goldingham, the steward of the forest, in the clearing of Weldon at Wrennemere, to ascertain who those evil doers were, and whence they came, and whither they returned.

Brigstock [an accused] was sworn, and said that full well he had heard it said that evil doers were in the forest at the same hour and in the same wood; but he does not know who they were, nor whence they came, nor whither they returned.

Stanion is sworn and says the same.

Weldon is sworn and says the same.

Benefield and Upthorp are sworn and say the same.

Churchfield is sworn and says the same.

Lyveden is sworn and says the same.

Richard the Harper of Upthorp is sworn, and says that he well understands that William the spenser of Sir Nicholas of Bassingbourn was there, and for this reason because on the same day he met a certain page of Sir Nicholas coming from the wood and carrying an empty barrel and a basket; and he asked him whence he came; and he said that he came from the carpenter of his lord. He says also that William the son of John Helle and William of

Houghton, who are of the household of Sir Nicholas of Bassingbourn, were there. He says also that Robert de Feugères, who used to be the yeoman of Sir Nicholas, was there; and he still goes to and fro, and dwells in the country of Cambridge, at Abingdon. He says also that Colin of Carlby in Glapthorn and Richard of Pattishall, the nephew of the same Colin in the same town, were there.

He says also that William, the servant of the parson of Benefield, was not there, because he knows nothing of the wood, and because the men of the household of Sir Nicholas hold him in hatred, and he was never associated to them. He says also that Alan Cut was not there with them neither then nor at any other time, because he is not associated to them.

He says also that Ralph of Sussex and Robert of Ardern, the foresters, were not there, because they were seen on the same day at full noon in the town of Brigstock; and after dinner when the huntsmen met the evil doers they were seen at Stanion at the house of Sir Henry of Deene, and they spent the night there. And this was witnessed by the verderers and by all the townships upon their oath. And Richard of Aldwinkle, the verderer, says upon his oath that those two foresters were with him on the same day from morn till noon.

He says also that on the vigil of the Exaltation of the Holy Cross in the thirty-fourth year of the reign of the King he went into the wood to seek his pigs; and he met William the spenser and greeted him.

And William replied : 'I do not greet you.'

'Why not?'

'Because you stole our buck.'

'Certainly not,' he said.

'Richard! I would rather go to my plough than serve in such an office as yours.'

And afterwards that buck was sought, and found salted in the house of Hugh Justice of Upthorp, the man of Sir Nicholas; and he, [Richard] when he knew it, distrained the said Hugh so much that he returned the said buck to him.



Hugh of Goldingham, the steward of the forest, and the foresters and verderers forthwith proceeded to Benfield, and searched the houses of Sir Nicholas of Bassingbourn, and they found no tokens of evil deeds to the venison. But Robert of Wick said that he saw in the same court the two evil doers who took him to their tree, to wit, William of Houghton and John the son of Richard of Lilford.

John Lovet, the verderer, and a certain forester with him, proceeded to Glapthorn and searched the house of Nicholas of Carlby; and they found in it a bow with a string, and twenty Welsh arrows, and mast estimated at half a quarter. The bow and the arrows remained in the hands of John Lovet, the verderer, to produce before the justices.

Pledges of William the spenser, answering before the justices in eyre of the forest . . .

Pledges of William of Houghton, Robert the son of Roger, Henry the smith, Geoffrey Meagre, Robert Kydenot, Henry Kyte, Jordan of Upthorp, William the son of the reeve, Hugh the son of Maud, Robert the son of Inge, Walter the son of Alan, Bennet the cobbler and Robert Mayden.

Pledges of Hugh Justice . . .

Pledges of William Helle . . .

Pledges of John, the son of Richard the reeve of Lilford . . .

Pledges of Ralph of Sussex . . .

Pledges of Alan Cut . . .

Pledges of Robert of Ardern . . .

Pledges of Colin of Carlby in Glapthorn . . .

Pledges of Richard of Pattishall . . .

#### 10. The Coroner's Court.<sup>1</sup>

##### *Two Oxford Students Quarrel, with Dire Result.*

It happened on Monday next before the feast of St. George the Martyr in the twenty-fifth year of King Edward that John Law-

1. From "Select Cases from the Coroner's Rolls, A. D. 1265-1413", ed. Charles Gross, Selden Society's Publications, 1895, vol. IX, p. 89.

rence died in the hostel where he dwelt in the parish of St. Peter-le-Bailly, and on the same day he was viewed by the coroner aforesaid, and he had no wound, but his whole body had been badly beaten. Inquest was taken on the same day before the said coroner by four neighbouring parishes, to wit, St. Peter-le-Bailly, St. Michael-in-the-North, St. Martin, and All Saints.

And all the jurors of that inquest say on oath that on the evening of Palm Sunday in the said year a certain clerk [student] named David of Northampton was in the street opposite the hostel where he dwelt in the parish of St. Michael-in-the-North under the northern wall of the town, and he was walking along and saying his prayers and orisons. And thither came the said John Lawrence, who meeting [David] pushed him with his shoulder once and again for the sake of causing a quarrel. The said David asked him to leave him in peace, and then entered his hostel. John went forthwith to the door of the hostel David had entered and rapped twice at the door. And David came forth with a certain staff and struck the said John upon the head, felling him to the ground, and beat him with the staff over the shoulders, back, loins, and head, so that he died on the said Monday; and thus he lived fifteen days, and he had all the rites of the church.

Meanwhile, however, the said David was summoned before Master John of Bloyou, who was then the Chancellor's commissary of the University of Oxford [having jurisdiction over clerks]; and likewise the said John Lawrence [was summoned]. And by an inquest held there before the said commissary both parties were sentenced to prison. While they were in prison, peace was made between the said parties through the commissary's intervention, and both of them were released from prison by the said commissary. And forthwith David left the town, and never afterwards was seen or found there; nor could any of his chattels be found or anything ascertained concerning them.

11. The Court of Star-Chamber.<sup>1</sup>

*Brutal Night-Riders elude the Harassed Sheriff.*

[As the antecedent of the modern Court of Star Chamber, the King's Council has generally been represented as a court of summary jurisdiction in criminal cases. Contrary to a prevailing belief, this was not its original function, but one that developed in time from force of necessity. There were always the crimes of great violence and oppression, named as riots, routs, confederacies, conspiracies, unlawful assemblages, forcible entries, maintenance of quarrels, etc. These were most dangerous when perpetrated by bands of armed men, often under the leadership of the most prominent knights in the counties, who might themselves be sheriffs, custodians of castles, justices of the peace, or in collusion with them. They intimidated courts, prevented the execution of writs, corrupted juries, held suitors in durance, and promoted litigation in the interests of their retainers. Sometimes we uncover a systematic endeavour on the part of a few strong men in a county by force and fraud to dispossess their weaker neighbours. But during the thirteenth, and most of the fourteenth century, the Council was concerned not with the trial of such cases, so much as with the elaboration of legal ways and means for dealing with them. . . . In *Ughtred v. Musgrave* (*infra*) violence was involved, but the case was heard because the defendant was a sheriff.]

*Ughtred and others v. Musgrave*

Petitions and processes made against Thomas Musgrave, sheriff of York, by Thomas Ughtred and others on the Quindene of Easter in the fortieth year of the reign of King Edward the Third [A.D. 1367].

1. From "Select Cases before the King's Council, 1243-1482", ed. *I. S. Leadam* and *J. F. Baldwin*, Selden Society's Publications, 1918, vol. XXVI, pp. xxx, 54. The King's Council in its judicial capacity was not known at this period as the Court of Star Chamber; this title was given by a later statute. "The Council and the Court of Star Chamber were practically the same body, . . . [the Star Chamber Court] was substantially the Council sitting in a judicial capacity" (Sir W. S. Holdsworth, "History of English Law", vol. IV, p. 60).—The opening passage here quoted is from the Editors' Introduction explaining this point of history.

Be it remembered that the lord the King has sent before his Council by John de la Lee, steward of his household, divers bills delivered to him, as follow &c. that the Council may cause to be done in that behalf that which shall be just &c. . . .

[These] are the injuries and wrongs done to John Hotham, knight, junior, by master Thomas Musgrave sheriff of York.

First, the said sheriff imprisoned the said John without process of law or indictment, or of any manner of appeal and without warrant and contrary to law, and the said sheriff held fourteen inquests against him and found no cause for imprisoning him, and the justices of our lord the King [both] of the peace and of the law, to wit, the lord Percy, master Ralph Neville, master John Mowbray, master William Finchden, and Roger Fulthrope held seven inquests of the knights and more substantial squires in the said county and could not find anything against the said John Hotham [for which] to imprison him. . . .

Whereupon the aforesaid Thomas Musgrave, summoned before the Council touching the premises, says that as to the taking and imprisonment of the bodies of the said master Thomas, master John, and Nicholas, he w[ishes] to say that he is sheriff of the county and one of the justices of the peace. To whom a great outcry daily comes from divers country folk that folk ride on the high road by day and night, carrying by night fire with them, threatening folk that they should be burnt if they did not make fines and ransoms, to wit, some twenty pounds and some ten pounds. And to this end they made great display; they kindled sparks of fire around their houses and set afire and aflame a vat of pitch, wherefore folk of those parts of the Wold were greatly affrighted and often made their complaints praying remedy and help of the said sheriff and did not dare to abide in their houses without keeping watch continually at night, twelve or ten men together, to the great cost and oppression of the people. And some were robbed of great substance, to wit, Walter Cotes of four score and fifteen pounds and divers other folk whose names are contained in a bill [sewn on to] these [papers].

[Wherefore the said sheriff wishing to guard the peace as he was sworn and bound by his allegiance] searched by all methods in his power by whom such robberies and affrays were made, and thereupon, though he knew nothing of it, comes a letter of the King demanding, upon penalty of as much as he had to forfeit, that he should make arrest and execution of those who committed such robberies and affrays or otherwise he would be held as a maintainer of the said robbers and malefactors. And because there was common scandal and outcry that those who are now complaining were under the scandal of the said deeds, the said sheriff arrested them, since which arrest no affrays nor robberies have been committed in [those parts]. And the surety that he took of the parties attached was not for the purpose of taking profit to himself, but that they might be ready to be [before] the King and his Council in case they should be commanded, as can be proved by their de-feasance [clause].

And thereupon the question was asked of the aforementioned Thomas Musgrave, if he desires to charge any particular act against the aforesaid Thomas Ughtred, John Hotham, knight, junior, and Nicholas Hotham, or if he himself held inquest of the premises in due manner as is supposed, or if they were themselves indicted before him, or if he found aught upon them whence a suspicion of crime might be entertained. The sheriff abides by his answer above said.

And thereupon Henry Lord Percy and Ralph Neville there present in the Council, who had been assigned by commission of the lord the King to inquire as to the above and other matters, were examined, and they say that they have diligently held inquest in that behalf . . . of diverse places in which it was right and needful and have caused the men who have been plundered . . . to be inquired touching the truth. Also that they have found nothing against the aforesaid Thomas Ughtred, [John and N]icholas Hotham touching the felonies aforesaid, nor have they heard that the aforesaid Thomas, John and Nicholas [have been indicted of those felonies] . . . or of other felonies of which . . . they had been suspected or arraigned.

And since the Council is of the opinion . . . [that] the aforesaid Thomas Musgrave has not alleged any particular act against the aforesaid Thomas Ughtred, John and Nicholas, or that they have been suspected of anything, . . . and since they have not been indicted, but only common cry and scandal [has been raised] against them, very likely since by an inquest in the [afore-said] county before the justices or the sheriff . . . [no] arrest in this case can be justified by the law of the land, it is [for-bidden] to the aforesaid Thomas Musgrave to [depart] from town until the lord the King shall have pronounced his will in that behalf. And the aforesaid parties were told that as they wished [to sue] the aforesaid Thomas Musgrave for losses in this . . . they should sue in the exchequer of the lord the King . . . or in the King's court appointed for such causes, if they shall see [fit].

## 12. The Manx Deemster and the House of Keys.<sup>1</sup>

### *The House Sustains the Deemster's Judgment.*

[In the Isle of Man (the large island off the northwest corner of England) the administration of justice was for nearly a thousand years in the hands of the Deemsters (as trial judges) and the House of Keys (as an appeal court),—quite independently of the regular English courts, even on appeal, until modern times. All this was an inheritance from the conquest and settlement of the island by

#### 1. The Introduction is based on the following works:

*Joseph Train*, "An Historical and Statistical Account of the Isle of Man", ch. XIX, Douglas, Quiggin, 1845, 2 vols.; *A Member of the Council*, "A View of the Principal Courts of the Isle of Man", Liverpool, Harris, 1817. See also the present writer's "Panorama of the World's Legal Systems", chap. XIII.

The case quoted is taken from the following rare book (loaned by courtesy of the Harvard Law Library): *J. C. Bluett*, "The Advocate's Note Book, being Notes and Minutes of Cases heard and determined before The Judicial Tribunals of the Isle of Mann"; Douglas, printed and published by Robert Heywood Johnson, 2, Great Nelson Street, 1847, pp. 402-403.

In Sir Walter Scott's "Peveril of the Peak" (Appendix to Introduction) is a full account of the long controversy in the middle 1600s, resulting in the unjust condemnation and execution of William Christian, a deemster, in 1662-63.

Scandinavian invaders, about A. D. 900, who brought with them the methods of ancient Scandinavia (*post*, Chap. 7). How independent was then the Isle may be inferred from the fact that the feudal lord, until the 1500s, styled himself "King of Mann".

The *Deemster* (from the Germanic word "doom", judgment) was the successor of the old Norse "Law Speaker" or "Law-Man" (there were two, one for the North, the other for the South, divisions of the Isle). He was the repository of all the traditions and rules of law, and until the 1400s these had never been committed to writing. The Deemster alone had the knowledge of them, and kept it within his own breast; so that they were known as "breast-laws", until a popular agitation forced their formulation in a series of written declarations of the customary law. Even those writings were, for long thereafter, kept locked in a chest, in custody of the chief officers of the Isle.

The Deemster held court at his own house, or as he walked about he might hold court anywhere when the litigants applied to him; for the Deemster's presence, whether walking or riding, made it a court. The Deemster when appointed must take oath on the Bible as follows: "By this book, and by its holy contents, and by the wonderful works that God has miraculously wrought in heaven and on the earth beneath in six days and seven nights, I do swear that I will without respect or favor or friendship, love or gain, consanguinity or affinity, envy or malice, execute the laws of the Isle justly between our sovereign Lord the King and his subjects within this Isle, and betwixt party and party *as indifferently as the herring's backbone doth lie in the midst of the fish*".

As time went on, his jurisdiction varied. Latterly, he called a jury of four or of six. In a "trespass case", this verdict could be "traversed", i. e. appealed, to another jury of six or more; and from this verdict or any judgment, there was a "traverse", or appeal, to the House of Keys.

The *House of Keys* was the successor to the old Norse Al-Thing, or popular assembly (*post*, Chap. 7), which might confirm or

reject the judgment below. The word "keys", of disputed origin, was probably a Celtic word, meaning "taxes" or "pleas".

The Keys were twenty-four in number, self-chosen by co-optation when a vacancy occurred. The original popular assembly of all freemen had here in course of time been limited to this manageable number,—as had long before taken place also in Greece, in Rome, in France, and in Germany. Their oath was, "You shall use your best endeavors to maintain the ancient laws and customs of this Isle, and shall be aiding and assisting to the Deemster in all doubtful matters".

At the trial of a capital felony, the meeting of the Keys was held in the open air, at the outer gate of the Castle, sitting jointly with the Governor, his Council, the Bishop and high clergy, and the Deemsters, and a jury of twelve. When the evidence was concluded, and the jury were ready with their verdict, the Deemster asked of the foreman, in Manx, "Vod fir caree soie?", meaning "Shall the men of the Altar remain?" If the foreman answered "no", the Bishop and clergy retired, for this answer imported a verdict of Guilty, and the clergy could not take part in a blood-penalty,—this same ancient Saxon custom being used also at the trial of a peer in the English House of Lords.

In the course of time, there were various changes in these details of jurisdiction and procedure, and by British statutes in the late 1700s an appeal to the King in Council was allowed, with other innovations. But the ancient terms and traditions can plainly be seen surviving in the following civil case as late as the year 1825:]

Jonathan Dumbell and Hugh Dumbell v. Creer.  
Gelling for Pltffs.; Kelly for Deft.

A Trespass Jury had been convened and sworn, at the suit of the pltffs., to discover who had broken certain windows in the pltffs.' out-house, and committed other damages. Four men were accordingly sworn by the Coroner, and, having examined many witnesses, found that several children, under the age of

fourteen, had committed the trespass. On account of the said children's tender age the jury found a verdict against their parents.

Creer, the respndt. and father of one of the children, when the jury gave in their verdict at the Deemster's Court, entered into bonds to traverse [appeal] the cause before a Jury of Six. The matter was accordingly argued before them, and they returned a verdict "that the only evidence against the traverser Creer, was the deposition of John Clague, which deposition was signed 'John Quayl his X mark,' and that the verdict against Creer for this irregularity ought to be reversed." From this verdict the plttf. Hugh Dumbell traversed [appealed] to the House of Keys. \* \*

The House directed the cause to proceed. \* \* \*

Gelling stated, that this was a traverse from the verdict of a Traverse Jury, which verdict was given in favour of the respndt. Creer, upon the grounds of irregularity, and that there was no evidence against Creer, save that of John Clague, whose deposition was signed "John Quayle his X mark." Now, he contended, that the evidence of John Clague was equally strong against the respndt's. son, notwithstanding the trifling mistake of another man's name being signed to it, and which he could easily explain, if allowed; but, independent of that, Ann Clague, another witness, proved that respndt's. son was with the other boys when the damage was done. Another witness says the same thing, and the respndt. himself, when examined before the Trespass Jury, proved that his son had confessed to him that he was with the other boys when they were there. He contended, therefore, there was quite proof enough against the respndt's. son, even without the evidence of Clague, and that the father, as the natural protector, ought also to be responsible for the improper acts of his son; at least, in cases of mischievous trespass of this nature.

Kelly contended that the proceedings were quite full of error. First a deposition is produced signed by a man who never swore it. In the second place, the Traverse Jury had been summoned out of the Middle Sheading [District], instead of out of Rushen Sheading; both were capital errors, and either ought to be sufficient to overturn the applnts.' case. He further contended that

the father ought not to be made responsible for the mischievous acts of his son, which it was not in his power to prevent.

The House affirmed the verdict of the Trespass Jury, reversing the verdict of the Traverse Jury.

### 13. The Tribunal of the Scottish Border.<sup>1</sup>

#### *An International Day of Truce, for Reciprocal Punishment of Wrongdoers.*

Leges Marchiarum, to wit, the Laws of the Marches; so statesmen and lawyers named the codes which said, though oft in vain, how English and Scots Marchmen should comport themselves, and how each kingdom should guard against the other's deadly, unrelenting enmity. . . . From Berwick to the Solway—the extreme points of the dividing line between North and South Britain—is but seventy miles in a crow's flight. . . . The Scots Borderers were dreaded by their own more peaceful countrymen, and to think of that narrow strip of country, hemmed in by the Highlands to the north, and the Border clans on the south, is to shudder at the burden it had to endure. For a race, whatever its good qualities, that lives by rapine, is like to be dangerous to friends as well as foes. . . .

To meet such conditions the Border laws were evolved. They were administered in chief by special officers called Wardens. Either Border was portioned out into three Marches: the East, the Middle and the West. . . . The Wardens had twofold duties: first, defense against the enemy; second, negotiation in time of peace with the "mighty opposite." Thus the Border Laws were part police and part international. . . .

Now the Laws of the Marches, agreed on by royal commissioners from the two kingdoms, regulated intercourse from early times. . . . In the century preceding the date of the union of crowns [A. D. 1603], the international code was very highly

1. From Frances Watt, "The Border Law", Boston, The Green Bag, 1898, vol. X, p. 487.

developed, and the procedure was strictly fixed and defined. As England was the larger nation, and as its law was in a more highly developed and more firm and settled state, its methods were followed on the whole. The injured party sent a bill of complaint to his own Warden; and the bill, even as put into official form, was simplicity itself. It is said that A. complained upon B. for that—, and then followed a list of the stolen goods, or the wrongs done. It was verified by the complainant's oath, and thereafter sent to the opposite Warden, whose duty was to arrest the accused, or at least to give him notice to attend on the next Day of Truce.

The Wardens agreed on the day, and the place was usually in the northern kingdom, where most of the defendants lived. The meeting was proclaimed in all the market towns on either side. The parties, each accompanied by troops of friends, came in; and a messenger from the English side demanded that assurance should be kept till sunrise the following day. This was granted by the Scots, who proceeded to send a similar message, and were presently rich in a similar assurance. Then each Warden held up his hand as a sign of faith, and made proclamation of the day to his own side (the evident purpose of this elaborate ritual was to keep north and south from flying, on sight, at each other's throats). The English Warden now came to his Scots brother, whom he saluted and embraced; and the business of the Day of Truce, or Diet, or Day Marche, or Warden Court, as it was variously called, began. That business was commerce and pleasure, as well as law. Merchants came with their wares; booths were run up; a brisk trade ran in articles tempting to the savage eye. Both sides were ready for the moment to forget their enmities. . . .

For our Bill of Complaint, it might be tried in more than one way. It might be by "the honor of the Warden," who often had knowledge of the case, personal or acquired, and felt competent to decide the matter off-hand. On his first appearance he had taken an oath (yearly renewed), in presence of the opposite Warden and the whole assemblage, to do justice, and he now officially

"fyled" or "cleared the bill" (as the technical phrases ran) by writing on it the words "Foull (or 'Clear,') as I am verily persuaded upon my conscience and honor."—a deliverance recalling the method wherein individual peers give their voice at a trial of one of their order.

This did not of necessity end the matter; for the complainant could present a new bill and get the verdict of a jury thereon, which also was the proper tribunal where the Warden declined to interfere. It was thus chosen: The English Warden named and swore in six Scots; the Scots did the like to six Englishmen. The oath ran in these terms:—"Yea shall cleane noe bill worthie to be fild, Yea shall file no bill worthie to be cleaned," and so forth. Warden sergeants were appointed who led the jury to a retired place; the bills were presented and the jurymen fell to work. It would seem that they did so in two sections, each considering complaints against its own nationality. If the bill was "fyled," the word "foull" was written upon it (of course, a verdict of guilty): but how to get such a verdict under such conditions? The assize had more than a fellow-feeling for the culprit. . . . It was strangely provided that "If the accused be not quitt by the oathe of the assize," it is a conviction. One very stubborn jury (*temp.* 1596) sat for a day, a night, and a day on end, "almost to its undoeinge." The Warden, enraged at such conduct, yet fearing for the men's lives, needs must discharge them. . . .

Well! Suppose the case too clear and the man too friendless, and the jury "fyled" the bill. If the offence were capital, the prisoner was held in safe custody, and was hanged or beheaded as soon as possible. But most affairs were not capital. . . . In a common case of theft, if the offender were not present (the jury would seem to have tried cases in absence), the Warden must produce him the next Day of Truce. . . . The guilty party, being delivered up, must make restitution within forty days, or suffer death, whilst aggravated cases of "lifting" were declared capital. In practice a man taken in fight or otherwise was rarely put to death. Captive and captor amicably discussed

the question of ransom. That fixed, the captive was allowed to raise it; if he failed, he honorably surrendered. The amount of restitution was the "Double and Salfbye," to wit, three times the value of the original goods, two parts being recompense, and the third costs or expenses. . . .

And now business and pleasure alike are ended, and the day (fraught with anxiety to official minds) is waning fast. Proclamation is made, that the multitude may know the matters transacted. Then it is declared that the Lord Wardens of England and Scotland, and of Scotland and England (what tender care for each other's susceptibilities!), appoint the next Day of Truce, which ought not to be more than forty days hence, at such and such a place. Then, with solemn salutations and ponderous interchange of courtesy, each party turns homewards. . . .

In 1606, by the Act I, Jac., Cap. I, the English Parliament repealed the Anti-Scots laws, on condition that the Scots Parliament reciprocated; and presently a kindred measure was touched with the Scepter at Edinburgh. The administration of the Border was left to ordinary tribunals, and the Laws of the Marches vanished to the lumber room.

#### 14. The Court of King Henry VIII's Household Peace.<sup>1</sup>

##### *How to Cut off a Noble Culprit's Right Hand with Ceremonious Efficiency.*

[In the days of bluff King Hal, when throngs of noblemen followed the Court in personal attendance, as his Majesty moved on from one royal residence to another,—when every gallant carried rapier and dagger,—when jealous strivings for the royal favor dominated all,—in that first half of the 1500s, the deadly duels and bellicose brawls at the Court reached such frequency as to endan-

1. From "The Statutes at Large", ed. Pickering, 1763, vol. V, p. 89.

The reader will recall that a principal theme of the plot in Sir Walter Scott's "Fortunes of Nigel" was the hero's liability to the dreadful penalty of this statute, because of his having drawn his sword to resent an insult while walking in the garden of St. James' Palace ("The Fortunes of Nigel", Chaps. XVI, XXX, XXXIII).

ger the King's personal peace. So a radical measure was taken. By the King's prerogative, such offences were triable by a Court made up of his own high household officials, but now by special Act of Parliament this Court was given a special procedure and empowered to impose the death penalty without benefit of clergy for any killing, while for a mere "malicious striking by reason whereof blood is shed" the penalty was to be the *loss of the right hand*.

The peculiar thing about this latter penalty was the ceremonious procedure provided for the comfort of the high-born gentlemen who might come to be subjected to this humiliating mutilation, which would forever bar them from taking a man's part in the society of their congeners:]

Statutes made at Westminster Anno 33 Hen. VIII and Anno Dom. 1541. Cap. XII, The Bill for the Household.

[Preamble recites that whereas "murders, manslaughters and other malicious strikings", shedding blood "within the limits of the King's palace or house", have become frequent during the King's residence there, and whereas if the King happens to remove elsewhere before trial his household Ministers lose jurisdiction thereof and the trial must be "by the order of the common law", thus often leading to delays and failures to punish, therefore

[Sect. I. Such offences may hereafter be tried "within any the palaces or houses where his Majesty" shall happen to be then demurrant, before "the Lord Great Master or Lord Steward" of the King's household, or his substitutes; and

[Sects. II, III, IV, V, that the usual proceedings of the King's coroner's inquisition and an indictment by 24 yeomen officers of the King's household, shall be had, and

[Sect. VI, that a jury of twelve of such persons shall be impaneled, and upon arraignment and trial and conviction of murder or manslaughter the person shall be punished with attainder and death, and

[Sect. VII. If a person be found guilty of "*malicious striking, by reason whereof blood is, hath been, or shall be shed, against*

the King's peace, within the said palace or house", then the punishment shall be, besides imprisonment for life, "*to have his right hand stricken off*".] And "for the further declaration of the solemn and due circumstance of the execution", it is therefore enacted.

Sect. VIII. . . . That the sergeant or chief surgeon for the time being, or his deputy, of the King's household, his heirs and successors, shall be ready at the time and place of execution as shall be appointed, as is aforesaid, to *sear the stump* when the hand is stricken off.

IX. And the sergeant of the pantry for the time being of the same household, or his deputy, shall be also then and there ready to *give bread* to the party that shall have his hand stricken off.

X. And the sergeant of the cellar for the time being of the same household, or his deputy, shall also be then and there ready with a *pot of red wine*, to give the same party drink, after his hand is so stricken off, and the stump seared.

XI. And the sergeant of the ewry for the time being of the same household, or his deputy, shall also be then and there ready with *clothes sufficient for the surgeon* to occupy about the same execution.

XII. And the yeoman of the chandry for the time being of the same household, or his deputy, shall also be then and there, and have in readiness seared *cloths, sufficient for the surgeon* to occupy about the same execution.

XIII. And the master cook for the time being of the same household, or his deputy, shall also be then and there ready, and bring with him a *dressing knife*, and shall deliver the same knife at the place of execution to the sergeant of the larder for the time being of the same household, or to his deputy, who shall be also then and there ready, and *hold upright the dressing knife* till execution be done.

XIV. And the sergeant of the poultry for the time being of the same household, or his deputy, shall be also then and there ready with a *cock* in his hand, ready for the surgeon to *wrap about the same stump* when the hand shall be so stricken off.

XV. And the yeoman of the scullery for the time being of the same household, or his deputy, to be also then and there ready, and prepare and make at the place of execution a *fire of coals*, and there to make ready *searing-irons* against the said surgeon or his deputy shall occupy the same.

XVI. And the sergeant or chief serror for the time being of the same household, or his deputy, shall be also then and there ready, and bring with him the *searing-irons*, and deliver the same to the same sergeant or chief surgeon, or to his deputy, *when they be hot*.

XVII. And the groom of the falcery for the time being of the same household, or his deputy, shall be also then and there ready with *vinegar and cold water*, and give attendance upon the said surgeon or his deputy, until the same execution be done.

XVIII. And the serjeant of the wood-yard for the time being, of the same household, or his deputy, shall bring to the said place of execution a *block*, with a betil, a staple, and cords, to *bind the said hand upon the block*, while execution is in doing.



*Chapter 3*  
*FRANCE*

## Chapter 3

15. *Trials in the Church-Court of Ivo of Brittany, A. D. 1300.*  
*The Judge prays to God to reconcile the Parties; and the Parties make Peace.*
16. *The Personal Justice of Louis IX, St. Louis.*  
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18. *The Trial of Joan of Arc, A. D. 1430.*  
*The Maid is Condemned by 43 Judges, then Vindicated by as Many More.*
19. *Benvenuto Cellini, sued at Paris for Highhanded Violence, Loses his Case,*  
*Then Stabs and Disables the Plaintiff to Punish his Effrontery.*
20. *Trials before the Tribunal of the Terror, A. D. 1794.*  
*Two Hundred Persons a Week sent to the Guillotine.*
21. *A Trial under the Directory, A. D. 1797.*  
*The Pope's Nuncio is acquitted, amidst Popular Acclaim.*

## FRANCE

### 15. Trials in the Church-Court of Ivo of Brittany, A.D. 1300.<sup>1</sup>

*The Judge prays to God to reconcile the Parties; and the Parties make Peace.*

[Ervoan Heloury Kermartin was born in a suburb of Tréguier, in Brittany, A. D. 1252; Ivo is the Latin shortening of the Celtic name; Yves, the French form. He studied theology at the University of Paris, then Roman law at the University of Orleans. In 1280 he returned to Tréguier as advocate; later became judge of the Church court there; and died in 1303. His austere life, his boundless charity, and his humane sympathy for the poor, made him universally beloved; and his wise and strict administration of justice made him famous. In 1347 he was formally canonized as a saint.

The first quoted passage represents a case of his which in one form or another has passed into legends attributed to others. The other passages are from testimony given at the canonization proceedings.]

It was during his three final student-years at Orleans (probably) that took place the celebrated incident of the Widow of Tours,—the only one of his hundreds of cases to which tradition has attached any legal details. It runs like this:

Tours was near Orleans; the bishop held his court there; and Ivo, while visiting the court, lodged with a certain widow. One day he found his widow-landlady in tears. Her tale was that next day she must go to court to answer to the suit of a traveling merchant who had tricked her. It seemed that two of them, Doe

1. From *John H. Wigmore*, "St. Ives, Patron Saint of Lawyers", *American Bar Association Journal*, 1932, Vol. XVIII, p. 157; founded principally on the depositions taken A. D. 1330 at the proceedings for canonization, in "Monuments originaux de l'histoire de Saint Yves", St. Brieuc, Prudhomme, 1887.

and Roe, lodging with her, had left in her charge a casket of valuables, while they went off on their business, but with the strict injunction that she was to deliver it up again only to the two of them jointly demanding it. That day, Doe had come back, and called for the casket, saying that his partner Roe was detained elsewhere, and she in good faith in his story had delivered the casket to Doe. But then later came Roe demanding it, charging his partner with wronging him, and holding the widow responsible for delivering up the casket to Doe contrary to the terms of their directions. And if she had to pay for those valuables it would ruin her. "Have no fear," said young Ivo, "You should indeed have waited for the two men to appear together. But I will go to court tomorrow for you, and will save you from ruin."

So when the case was called before the Judge, and the merchant Roe charged the widow with breach of faith, "Not so," pleaded Ivo, "My client need not yet make answer to this claim. The plaintiff has not proved his case. The terms of the bailment were that the casket should be demandable by the two merchants coming together. But here is only one of them making the demand. Where is the other? Let the plaintiff produce his partner!" The judge promptly approved this plea.

Whereupon the merchant, required to produce his fellow, turned pale, fell a-trembling, and would have retired. But the judge, suspecting something from his plight, ordered him to be arrested and questioned; the other merchant was also traced and brought in, and the casket was recovered; which, when opened, was found to contain nothing but old junk. In short, the two rascals had conspired to plant the casket with the widow, and then to coerce her to pay them the value of the alleged contents. Thus the young advocate saved the widow from ruin.

The fame of this clever defence of the widow soon went far and wide. It followed Ivo to Tréguier, whither he returned, about 1280, to practice as advocate, while still serving his initiate for the priesthood. He took only the cases of the poor, the widows, and the orphans. Every applicant for his help he required first to make oath that his cause was in conscience a just one; then Ivo

would say "Pro Deo te adjuvabo" ("For the sake of God, I will help you"). And the maxim of his practice (said to be embodied in the ancient Customal of Brittany) was that every claim must be founded on "good law and equity" ("bon droit et raison"; for "raison", or "ratio", in those days corresponded to our "equity").

(One among the witnesses at the canonization proceedings was a lawyer (No. 1 on the list), and his testimony is worth a brief quotation:

"Ivo without charge took cases for the poor, the widows, the orphans, and other distressed persons, offered himself for the defence of their rights without being asked, and thus was commonly known as 'the advocate of the poor and oppressed.' Asked how he knew this, said that he himself had often been present as advocate with the said master Ivo at many trials. Asked how he knew that Ivo had acted without charge, said that many poor persons had told him of it, with warmest gratitude for Ivo. Furthermore, this witness testified that the said master Ivo was a man of great justice as a judge. Asked how he knows this, said that he had seen Ivo as judge both at Rennes and at Tréguier, where Ivo gave speedy justice to every one without distinction of persons. Said also that one-third of the salary which Ivo received as chancellor at Tréguier was given in alms to the poor, and that he would always use every effort to reconcile in peace and concord the parties that came before him with their disputes. Asked how he knows this, said that he had many times seen and heard it, when he was advocate in the court of Ivo at Tréguier."

This constant practice of Ivo as judge to urge the disputants to become reconciled before trial and thus avoid an open contest in court is a characteristic of his procedure. It is illustrated in the following anecdote, told by a witness (No. 13) who had known Ivo for twelve years; and the notable thing is that this witness, Walfred, was the very party who at first refused obstinately to come to terms:

"The witness had long been in controversy with Ralph of Porcas, an ecclesiastic of the diocese of Lameur Dol, and with the said Ralph's brother James, both being sons [by a former marriage]

of the witness' wife; and none could avail to make peace between them. But one day when the said witness and his wife and the two sons were at the church in Tréguier [where the court was held], Master Ivo spoke to the witness somewhat as follows: 'Walfred, in the name of God's love, do you and your wife make peace with her sons; for I will arrange, if you will agree, to bring about harmony between you and them'. Whereto the witness replied to Master Ivo somewhat as follows: 'We will have no peace, except what law and justice will award to us'. Then spoke Master Ivo to the witness and his wife: 'Do you wait here until I return, for I am going now to celebrate the mass of the Holy Spirit, and I will ask God to help me to bring about peace between you'. And when the mass was over, Master Ivo returned to the two spouses, and they found themselves unable to oppose him any longer, and said, 'Master, do what you will to put an end to our discord.' And it seemed clear to the witness that their will to dispute was transformed by the prayers of Master Ivo, and that God had willed that through Master Ivo there should be concord between them. Asked why he thought that, witness answered that Master Ivo had said that he would ask God to reconcile them, and that though they had beforehand persisted in refusing, yet now by the action of Master Ivo the disputants were completely reconciled."

May it not be said that St. Ives was the first judge to use the modern pre-trial procedure of conciliation?

#### 16. The Personal Justice of Louis IX, Saint Louis.<sup>1</sup>

*The King does Justice in his Garden under a Tree.*

[Louis IX, whom France has venerated for seven centuries as Saint Louis, came to the throne A. D. 1226, at the age of twelve. His leadership in going on the Crusade of A. D. 1248, to redeem

1. From *Marius Sepet*, "Saint Louis" (in the "Saints Series"), London, Duckworth & Co., 1899, pp. 172, 180; quoting a passage from "Memoirs of John Lord of Joinville, Grand Seneschal of Champagne, etc.", translated by Thomas Johnes, London (?), Hafod Press, 1807, p. 103.

the Holy Land, has given him great fame in history. But, independently of this, his character and deeds as a progressive ruler of France, his ascetic habits, his religious devotion, his sacrificial interest in the poor, the sick and the oppressed, and above all his strict and active supervision of the administration of justice, marked him as unique among royal rulers. Voltaire said of him, "Louis IX appeared to be a prince destined to reform Europe,—if she could have been reformed."

Much of our knowledge of his personality is owed to his intimate friend and biographer, the Sire Jean de Joinville, seneschal of the County of Champagne, and the King's closest adviser, from whose memoirs is taken the first passage, cited by all historians. The second passage, on the case of the powerful Baron Enguerrard de Coucy, is from a summary of the report by his wife, Queen Margaret's, chaplain at the proceedings for canonization:]

It often happened in summer that he went after mass to sit in the wood of Vincennes, and leaned his back against an oak tree, and bade us sit round him. And all those who had business came to speak to him, not hindered by his guards nor by other people. And then he would ask with his own mouth: "Is any one here who has a cause?" And those who had a cause stood up. And then he said: "Be silent all of you, that we may take one after the other." And then he would call Monseigneur Peter of Fontaines and Monseigneur Geoffrey of Villette, and would say to one of them: "Decide this cause for me." And when he found anything to correct in the words of those who spoke for others, he himself spoke the correction with his own mouth.

Sometimes in summer I have seen him come into his garden in Paris to decide causes, wearing a camlet tunic, a sur-coat without sleeves, a mantle of black taffety round his neck, his hair well combed and flowing, a cap made of the feathers of a white peacock on his head. And he would have carpets spread that we might sit round him, and all the people who brought causes before him stood up in his presence. And then he would dismiss them after the manner of which I have told you in the wood of Vincennes.

. . . . .

Three young nobles of the county of Flanders were surprised, together with the abbot of St. Nicholas, in a wood pertaining to Baron Enguerrard de Coucy, with bows and arrows. Although they had neither dogs nor hunting implements, they were found guilty of having gone out [unlawfully] to hunt, and were hanged [by the Baron's court]. The abbot and several women of their families made complaint to the King, and Enguerrard was arrested and taken to the Louvre. (Enguerrard de Coucy was one of the first barons of the kingdom, chief of one of the most illustrious and powerful houses, next to those of the great feudatories.) The King summoned him before him. He appeared, having with him the King of Navarre, the King of Burgundy, the counts of Bar, Soissons, Brittany, and Blois, the archbishop of Rheims, sire John of Thorote, and nearly all the great men in the kingdom. The accused said that he wished to take counsel, and he retired with most of the seigneurs who had accompanied him, leaving the King alone with his household. When he returned, John of Thorote, in his name, said that he would not submit to this inquiry, since his person, his honour, and his heritage were at stake, but that he was ready to do battle, denying that he had hanged the three young men, or ordered them to be hanged. His only opponents were the abbot and the women, who were there to ask for justice.

The King answered that in causes in which the poor, the churches, and persons worthy of pity, were concerned, it was not fitting to decide them in battle; for it was not easy to find anyone to fight for such sorts of people against the barons of the kingdom. He said that his action against the accused was no new thing, and he alleged the example of his predecessor Philip Augustus. He therefore agreed to the request of the complainants, and caused Enguerrard to be arrested by the sergeants and taken to the Louvre. All prayers were useless; St. Louis refused to hear them, rose from his seat, and the barons went away astonished and confused.

They did not, however, consider that they were beaten. They again came together; the King of Navarre, the count of Brittany, and with them the countess of Flanders (who ought rather to have

intervened for the victims). It was as if they had conspired against the King's power and honour; for they were not content to implore Coucy's release, but asserted that he could not be kept in prison. The count of Brittany maintained that the King had no right to institute inquiries against the barons of his kingdom in matters which concerned their persons, their heritage, or their honour. The King replied, "You did not speak thus in former times, when the barons in direct dependence upon you came before me with complaints against yourself, and offered to sustain them in battle. You then said that to do battle was not in the way of justice." The barons put forward a final argument, namely, that according to the customs of the kingdom, the King could only judge the accused and punish him in person after an inquiry to which he had refused to submit. The King was resolute, and declared that neither the rank of the guilty man nor the power of his friends should prevent him from doing full justice.

Coucy's life was, however, spared. The fact that he had not been present at the judgment, nor at the execution, prevailed in his favour. By the advice of his counsellors the King condemned him to pay 1200 'livres parisis', which, considering the difference in the purchasing power of money, may be estimated at considerably more than £400,000, and he sent this sum to St. John of Acre for the defence of Palestine. The wood in which the young men were hanged was confiscated to the abbey of St. Nicholas. The condemned man was also constrained to found three perpetual chapelries for the souls of his victims, and he forfeited jurisdiction over his woods and fish ponds, so that he was forbidden to imprison or execute for any offence which had to do with them.

Since Enguerrard's defender, John of Thorote, had in his anger told the barons that the King might as well hang them all, the King, who had been told of this, sent for him and said, "How comes it, John, that you have said I should hang my barons? I certainly will not have them hanged, but I will punish them when they do amiss." John of Thorote denied that he had said this, and offered to justify himself on the oath of twenty or thirty knights. The King would not carry the matter further, and let him go.

17. A Baronial Court of High, Middle, and Low Justice, A.D. 1220.<sup>1</sup>*A Busy Day in the Court of Conon, Baron of St. Aliquis.*

[At that period, in France as elsewhere, each duchy or principality, each barony and other feudal domain, had its own semi-independent administration of justice. The King could not intrude on this jurisdiction without the local feudatory's consent. In any one of the hundreds of local baronial jurisdictions, the everyday course of penal justice may be gathered from the following pen-picture, by a modern scholar who ably combined the knowledge of the historian with the art of the novelist:]

The barons of St. Aliquis acted very nearly like sovereign princes. They, of course, had their own gallows with power of life and death, and even coined a little ill-shapen money with their own superscription. . . . One of the great duties of a high seigneur is to render justice. It is for that (say learned men) that God grants to him power over thousands of villeins and the right to obedience from nobles of the lower class. Indeed it can be written most properly that a good baron "is bound to hear and determine the cause and pleas of his subjects, to ordain to every man his own, to put forth his shield of righteousness to defend the innocent against evildoers and deliver small children and such as be orphans and widows from those that do overset them. He pursues robbers, raiders, thieves, and other evildoers. For this name 'lord' is a name of peace and surety." . . . . .

The best of barons only measurably live up to this high standard. Yet Baron Conon of St. Aliquis is not wholly exceptional in telling himself that a reputation for enforcing justice is in the end a surer glory than all the fetes around St. Aliquis. . . . .

1. From Wm. Stearns Davis, "Life on a Medieval Barony", New York, Harper's, 19—, chap. X.

As an exception to the general plan of the present compilation, the passage here given is not the contemporary narrative of a participant or an eyewitness. But Professor Davis was an historian of highest attainments, and skilled also as a novelist, and he pieced together this narrative of a typical court from innumerable fragments of authentic contemporary records, making it as dependable a picture as if he himself had been an observer.

The laws enforced in the St. Aliquis region are the old customary laws in use ever since the Frankish barbarians' invasions. Many of these laws have never been reduced to writing—at least for local purposes—but sage men know them. There are no professional jurists in the barony. Sire Eustace, the seneschal, understands the regional law better than any other layman around the castle, though he in turn is surpassed by Father Grégoire. The latter has, indeed, a certain knowledge of the Canon law of the Church, far more elaborate than any local territorial system, and he has even turned over the leaves of voluminous parchments of the old Roman law codified by the mighty Emperor Justinian. Up at Paris, round the King there are now trained lawyers, splitters of fine hairs, who say that this Roman law is far more desirable than any local "customary law", and they are even endeavoring (as the King extends his power) to make the Code of Justinian the basis for the entire law of France. But conditions on most baronies are still pretty simple, the questions to be settled call merely for common sense and a real love of fair play on the part of the judges. One can live prosperously and die piously under rough-and-ready laws administered with great informality.

Conon has "high justice" over his vassals and peasants. This means absolute power of life and death over any non-noble on the seignury,—unless, indeed the baron should outrage merchants bound to a privileged free city, or some other wayfarers under the specific protection of the King or the Duke of Quelqueparte. If strange noblemen get into trouble, it will depend on circumstances whether Conon undertakes to handle their cases himself, or refers them to his suzerain, the duke. The right of seigneurs to powers of justice on their own lands even over high nobles is, however, tenaciously affirmed, and it is only with difficulty that the duke and, above him, the King can get some cases remitted to their tribunals. If, however, the alleged offender is a monk, he will be handed over to the local abbot or, if a priest, to the bishop of Pontdebois to be dealt with according to the law of the Church.

Even the lesser sires have "low justice" with the privilege of clapping villeins in the stocks, flogging, and imprisoning for a con-

siderable time for minor offences; and robbers caught on their lands in the act of crime can be executed summarily. But serious cases have to go to the court of the baron as high justiciar, as well as all the petty cases which have arisen on the lord's personal dominions. If the litigants are peasants, the wheels of justice move very rapidly. There is a decided absence of formalities.

A great many disputes go before the provost's court, presided over by Sire Macaire, a knight of the least exalted class, who is Conon's "first provost". . . . One of Sire Macaire's main duties is to chase down offenders, acting as a kind of sheriff, and after that to try them. . . . Small penalties are handed down every day, but more serious matters must wait for those intervals when Messire Conon calls his noble vassals to his "plaids" or "assizes". Every fief-holder is expected to come and to give his lord good counsel as to what ought to be done, especially if any of the litigants are noble. . . .

However, most St. Aliquis cases concern not the nobles, but only villeins, and with these (thanks be to Heaven!) short shrifts are permitted. The provost can handle the run of crimes when the baron is busy; but a good seigneur acts as his own judge if possible. Even during the festival period it is needful for Conon to put aside his pleasures one morning to mount the seat of justice. In wintertime the tribunal is, of course, in the great hall, but in such glorious weather a big shade tree in the garden is far preferable. Here the baron occupies a high chair. Sire Eustace sits on a stool at his right, Sire André and another vassal at his left as "assessors", for no wise lord acts without council. Father Grégoire stands near by, ready to administer oaths on the box of relics. Sire Macaire, the provost, brings up the litigants and acts as a kind of State attorney.

For the most part it is a sordid, commonplace business. Two villeins dispute the ownership of a yoke of oxen. A peddler from Pontdebois demands payment from a well-to-do farmer for some linen. An old man is resisting the demands of his eldest son that he be put under guardianship: the younger children say that their

brother really covets the farm. If the court's decisions are not so wise as Solomon's, they are speedy and probably represent substantial justice.

But there is more serious business in hand. The news of the fctes of St. Aliquis has been bruited abroad. All the evil spirits of the region have discovered their chance. Certain discharged mercenary soldiers have actually invaded a village, stolen the peasants' corn, pigs, and chickens, insulted their women and crowned their deeds by firing many cottages and setting upon three jongleurs bound for the tourney. They were in the very act of robbing them to their skin when a party of the provost's men, coming up, managed to seize two of these sturdy rascals. . . . They keep a sullen silence and refuse to betray the lair of their comrades who have escaped. The provost intimates that they may be halegrins, and outlaws of the foulest type, said to violate tombs and devour human flesh. . . . Such fellows are, of course, food for the crows, but they must not be allowed to get out of life too easily. "Let the baron command preparatory torture?" suggests Sire Macaire, with a sinister smile. Conon nods. The two beastlike wretches groan and strain at their fetters. Preparatory torture, they know well, is inflicted both to get a confession of guilt and also to extort details about accomplices. . . . The miserable pair are not long uncertain about their fate. They have told the truth about the lair of their comrades. The provost's band surprises the spot. Six hardened rogues, in the very act of counting their plunder, are overpowered. But why weary Messire the Baron with the empty form of trying these robbers when there is no mortal doubt of their guilt and no new information is to be extracted from them? Their throats are therefore cut as unceremoniously as the cook's boy attends to pigeons. The next day, wholly casually, Sire Macaire reports his good success to his lord, and remarks, "I presume, fair Sire, that Denis can hang the two he has in the dungeon." Conon (just arranging a hawking party) rejoins: "As soon as the chaplain can shrive them." Why, again, should the prisoners complain? They are certainly allowed to prepare decently for the next world, a favor entirely

If there had been any real doubt as to the guilt of the two bandits, they might in desperation have tried to clear themselves by ordeal. If they could have picked a stone out of a caldron of boiling water, lifted and carried a red-hot iron, or even partaken of the Holy Sacrament (first calling on God to strike them dead if they were guilty), and after such a test seemed none the worse, they might have had some claim to go free. Ordeals are an old Germanic usage. They seem to refer the decision to all-seeing God. But ever since Charlemagne's day they have been falling into disfavor. Great churchmen are ordinarily too intelligent to encourage them. Men learned in the law say that often they wrest justice. Brave knights declare the only ordeal worth having is a duel between two champions. . . .

Naturally many petty offences do not deserve death. The criminals are usually too poor to pay fines, and it is a waste of honest folk's bread to let them spend set terms in prison. For small misdemeanors it is often enough to drive the rascals around the neighboring villages in a cart, calling out their names amid hootings and showers of offal. But in the village beyond the Claire is located the pillory for a large class of rogues. . . .

But if a villein has committed a great crime, he were best dismissed from an overtroubled world. Dead men never bother the provost twice. All over France you will find a gallows almost as common a sight in the landscape as a castle, an abbey, or a village. Many a fine spreading tree by the roadway has a skeleton be-dangling from one of its limbs. It is a lucky family of peasants which has not had some member thereof hanged, and even then plenty of rogues will die in their beds. Considering the general wickedness abroad, it seems as if there were a perpetual race between the criminals and the hangmen, with the criminals well to the fore.

## 18. The Trial of Joan of Arc, A.D. 1430.<sup>1</sup>

*The Maid is Condemned by 43 Judges, then Vindicated by as Many More.*

[In the year 1429 King Henry VI of England was, by inheritance, the feudal suzerain of a large part of France, and indeed was a claimant to the French throne and was at war with King Charles VII of France and in occupation of its northern regions. Charles VII, weak in character, was surrounded by powerful jealous feudal princes and ecclesiastics. In the village of Domrémy, in Lorraine, lived a pious but precocious girl Jeanne d'Arc (known ever afterwards in English as Joan of Arc, the Maid of Orleans). She had been hearing divine voices telling her that she was destined to deliver France from its enemies. At last, in 1429 (being then 17 years of age), she went to the King and told her story. Being finally allowed to lead the troops, she achieved a complete victory at Orleans, and ultimately the English King retired from all his possessions in France (except Calais).

But meanwhile, at the siege of Paris, Joan's forces were defeated, and she herself became the prisoner of the Duke of Burgundy (allied with the English King), who sold her to the English.

But the jealous and ungrateful ecclesiastics of France were determined to put an end to her prestige. It was a period, in all countries of Europe, when sorcery and heresy were universally dreaded and were popular grounds for persecution. The offences were ecclesiastical; but since the Church deemed itself unfit to shed blood, the accused was tried by a Church tribunal, and if

1. From *Wm. N. Gemmill* (Judge of the Municipal Court of Chicago), "The Four Trials of Joan of Arc", Case and Comment, Lawyers' Cooperative Publishing Co., Rochester, New York, 1917, vol. XXIII, p. 965.

The first two of the "four trials" in Judge Gemmill's title refer to the preliminary testing of her character before she was allowed to be given command of the troops; his third trial is her trial for heresy; and his fourth trial is the commission that vindicated her posthumously.

The paragraph beginning "There are, as you know", etc. is taken from Sir John Macdonell's "Historical Trials" (Oxford, 1927) as giving a better idea of the procedural significance of the trial than the original paragraphs of Judge Gemmill's, by permission of the publishers.



condemned was handed to the secular authority for execution; the penalty being death at the stake.

The English authorities handed over Joan to the French Bishop of Beauvais for trial on charges of sorcery and heresy.]

There were three jurisdictions in which she might be tried: The ecclesiastical, the Inquisition, and the civil courts.

The University wanted her tried by the Inquisition, but both the grand Inquisitor and the vicar at Rouen refused to act.

The University then appealed to the Pope, urging that Pierre Cauchon be appointed archbishop of Rouen. This request was refused. Cauchon had recently been dismissed from his diocese because of scandalous conduct, and at this time he neither had territory nor clergy of his own.

A special decree was issued by the King, appointing Cauchon to conduct the trial at Rouen, and the Cathedral at Rouen granted him letters to act as ecclesiastical judge in that diocese.

The bishop immediately proceeded to organize the court.

Under the rules of the Inquisition the presiding judge might call to his aid as many others as he chose, and confer on them full power to act as judges. The bishop thereupon selected forty-two of the most eminent scholars and ecclesiastics in France to act as judges. Fifteen of them were doctors of divinity, ten of them from the University of Paris. Four were doctors of canon law, four doctors of medicine, seven bachelors of divinity, three bachelors of canon law. The other nine were assessors. Under the rules it was necessary that some representative of the Inquisition participate in the trial. Jean Lemaitre, vicar at Rouen, was summoned, but he refused to act with Cauchon. He was later ordered by the Grand Inquisitor to proceed to Rouen and sit as an assessor. . . .

There are, as you know, two great systems of trials. One is that known to this country and now generally adopted in civilized countries, in which an accuser comes forward and formulates precise charges which he offers to prove by evidence; in the secular courts, speaking generally, the prosecutor must state his case

at the outset, show his hand, make good his accusations. There is another system now generally discredited, but at the time of which I speak in full operation in all ecclesiastical courts and to some extent adopted in secular courts, in which an accused is arrested on suspicion, no precise charges are made, but a case against him is gradually built up by examination, repeated at discretion in private. Such was the system in operation in the ecclesiastical courts in France; and the preparatory process, as it was termed, consisted in this case in interrogating Jeanne d'Arc chiefly in prison, with a view to obtain material upon which to found charges of sorcery and heresy; a course which shocks one's sense of justice, but which was entirely in accordance with ecclesiastical law. . . . There had come into existence and had by this time been perfected a terribly potent machine, one unsurpassed in efficacy for turning innocence into guilt; one by which all securities for fair play were removed; a system under which, even when physical torture was not resorted to, the accused was by repeated examination, by threats, by tricks and devices, by false suggestions, by banishing all counsel or friends, and by lowering the diet, reduced to a condition in which the prosecutor wrung out of his victim what he desired. The accused was unable to call witnesses; few were bold enough to act as counsel in proceedings which exposed them to the risk of being prosecuted for heresy; conviction was a matter of course.

For a long time many rumors were afloat concerning the strange beliefs and conduct of Joan. It was said that from childhood she had practised sorcery and witchcraft, and that she always carried concealed in her bosom the Mandragora, through which she exercised a demoniacal influence over all with whom she came in contact. In order to formulate definite charges against her, a large number of spies were sent to her childhood home, and wherever else she had been, and almost every act of hers, however innocent in its character, was tortured into some evidence of guilt.

On January 9, 1431, the trial began in the chapel of Rouen Castle. The first assembling of the judges was for the purpose of formulating the charges. Less than one half the judges had

arrived to participate in the opening session, and the trial was continued from day to day until February 21st. On this day most of the judges were present, and Joan was conducted in chains before the bar. She had now been imprisoned in the tower for five months. Nearly all of this time she was held bound in chains. When she stood before her judges, the chains were removed.

She was first addressed by Cauchon, who commanded that she take the oath "to tell the truth, the whole truth, and nothing but the truth." She refused to be sworn, saying that she would tell the truth, but not the whole truth, because there were some things she would tell only to God.

She was then severely questioned, nearly all of the judges participating from time to time. They asked concerning every incident of her life, the voices she had heard, the visions she had seen, and of her strange adventures.

For six days in succession this inquisition continued.

At the end of this time Joan was completely exhausted, and much sympathy was manifested for her by the public and by several of her judges. One of these, Jean Lochier, a distinguished lawyer, denounced the methods of the court, and refused to continue as a judge. Eighteen other judges followed his example, and left the court. Their places were speedily filled by others more pliable to the will of Cauchon.

For several days thereafter, several of the most aggressive judges continued their examination of Joan inside the prison. After that two judges and six counselors from Paris met daily at the bishop's house to formulate the charges. Up to this time the whole examination of the prisoner was for the purpose of leading her to make admissions from which definite charges could be formulated. Seventy definite articles of accusation were prepared, each one containing a specific charge.

On the 27th of March, the judges all assembled, and Joan was brought into court. She was required to stand and make formal answer to each accusation, as it was read to her by the judges. She pleaded to be allowed counsel to advise her, before making

answer. This request was denied. It took two full days to read the charges and receive her answers thereto.

Immediately thereafter the judges voted that her answers were unsatisfactory.

During the entire trial not a single witness appeared in person before the court. All the evidence was produced in the form of affidavits, and these were always written in the third person, the object being to completely conceal from the accused both the name and identity of the witness. This was according to the Code of the Inquisition.

After the answers to the seventy articles of accusation were rejected, all the charges were combined into twelve Latin articles, and these, together with Joan's answers thereto, were forwarded to the University of Paris. They were accompanied by a written request from the Court that an expert opinion be given by the University, touching the sufficiency of the answers and the guilt or innocence of the accused.

The principal charges contained in the twelve articles were, that Joan had refused submission to the church; that she had consorted with fairies and evil spirits; that the "Beautiful May" tree and the fountains about Domrémy were the haunts of evil spirits; that Joan had alone at night hung garlands upon this tree; that she left her home without the consent of her parents; that she refused to marry a man to whom she was engaged; that she wore masculine attire; that she refused to take the oath; and that she concealed in her bosom the Mandragora.

The reply of the University of Paris was received by the Court in Rouen on May 19th. The Court at once reassembled, and the expert opinion of the University was publicly read. The opinion was, in all respects, adverse to Joan. The Court was urged to make haste and punish the woman who had so scandalized the church.

Each judge was then required to rise, when his name was called, and vote specifically upon the question of the guilt or innocence of the accused.

All voted guilty. But the majority wished to give the maid an opportunity for repentance. Some wanted her confined in prison until she became of age.

For the purpose of receiving her abjuration, two scaffolds were erected in the center of the graveyard of St. Ouen. The scaffolds faced each other, and were but a few feet apart. Joan was seated upon one of these, while her judges mounted the other, and a clamorous multitude surrounded the scene. With the maid was Erand, a noted preacher, whose duty it was to preach the final sermon to the now frightened and quivering prisoner, in such a way that her stubborn soul would be led to repentance.

The preacher's text was: "A branch cannot bear fruit, except it abide in the vine." For more than an hour this hypocrite, cloaked in the garb of a minister of God, denounced this sixteen-year old girl as a "child of the Devil," and called upon her to immediately sign articles of abjuration, which had previously been prepared.

Joan tremblingly begged for mercy. She asked to be taken before the Pope, and declared that she would tell him all. This was denied her. The preacher shouted: "Sign now or be burned today." Half fainting, the exhausted girl muttered: "Better sign than burn." She could not write her name. The preacher grabbed her hand, which held the pen, and hastily executed the cross.

Immediately thereafter she was removed to her former prison, and, in the presence of many of her judges, was stripped of all her male attire, and was required to clothe herself in female garments. As night approached, Joan, utterly exhausted, fell asleep. When morning came she discovered that her female garments had been removed and in their place was the masculine attire she had discarded the day before. In this she was soon arrayed, unconscious of the fact that a trap had been deliberately laid and that she was its victim. The spies on guard soon reported what their eyes had witnessed.

The judges were immediately summoned. Only twenty-one of the original forty-two assembled. The vacancies were filled by Cauchon from among the distinguished men who had already

gathered to witness the burning of a heretic. The bishop addressed the court. There was no longer any doubt that the prisoner was in partnership with the Devil.

Each judge was required to vote separately, and all voted for her immediate death. The only point of disagreement was whether her body should be mutilated before her spirit had flown.

The bishop ordered that the sentence should be executed the next morning at 8 o'clock.

Very early on the morning of May 30, 1431, two scaffolds were erected in the old market place at Rouen. At 9 o'clock the procession started. Joan rode in a cart drawn by four splendid horses. Six hundred soldiers acted as her escort. A mob of 10,000 fickle wretches followed, crying: "Witch! heretic! apostate!" All the judges, civil magistrates, and doctors of divinity mounted one scaffold. Upon the other was Joan.

The judges had decreed that, before she should be given to the flames, she must undergo the torture of another sermon, not that she might now repent, for she was beyond the pale, but that her soul might not linger forever in hell. The preacher was Doctor Nicoli Midi, a shining light of the University of Paris. His text was: "If one member suffers, all the members suffer with it." For half an hour he wrung the soul of the girl, until she cried with bitterest agony. Some of the judges who had come to gloat, fell upon their knees and wept. Others slunk away in the crowd.

The sermon done, Joan was seized by three soldiers and carried to the top of a huge pile of wood, where she was bound to a stake. No civil judgment of death had been rendered, as the law required. The executioners, without legal order, applied the torch and the flames leaped forth.

Some of the spectators said they saw the word "Redeemer" through the fierce furnace blast. Others said they saw three angels in the flame, and still others saw a white dove hovering just above an upturned face.

A few of the judges who had not fled met and decreed that the ashes of the heretic should be thrown into the Seine. Before this

could be done, the winds not only scattered the ashes, but carried to the remotest parts of France a conviction that the foulest crime had been committed against an innocent girl. . . .

Two years had not elapsed before all the judges, except Cauchon, were in hiding. He brazenly defied public sentiment until the last. The city of Orleans voted a pension to the mother of Joan, and a monument was erected to the maid in the public square of Rouen, where the stake had been.

The Duke of Bedford, at the head of the English army, became a fugitive, and the whole army was hastily withdrawn across the channel. France once more became united, and Charles VII was her King.

Joan's father died of a broken heart. Her oldest brother fell fighting for his King. Her aged mother alone was left to see that time should vindicate the real character of her "Little Girl," as she called her.

She first pleaded with the Roman Cardinal at Rouen. He treated her kindly, and offered to accompany her to the Pope at Rome. She gladly accepted the offer, and was soon after received by Pope Calixtus III, who listened to her story with great sympathy and immediately addressed a letter to the Archbishop of Reims and the Grand Inquisitor of France, appointing them commissioners and directing that they, without delay, summon a solemn public audience in the great Episcopal Palace of Paris, where public announcement should be made of a Papal decree, granting a rehearing of the case against Joan of Arc.

This assemblage met November 17, 1455. It was a magnificent affair, attended by nearly all the most distinguished dignitaries of France. In the midst of these the mother of Joan was seated. As soon as the decree was announced, the commissioners issued citations to all the judges and assessors who had participated in the great trial. Several of the judges had died in the twenty-four years that had elapsed, among these being Pierre Cauchon and Jean Lemaitre. Citations were issued to all the heirs of the judges who had died, commanding them to appear on the 12th of De-

cember, 1455, and defend the memory of their dead. These citations were nailed upon all the doors of all the churches in Paris, Reims, and Rouen.

When the new Court met in December, many of the old judges were present. The heirs of the dead judges sent word that they did not care to defend the memories of their ancestors. All the witnesses whose testimony had been given in the former trial, and who were still alive, were summoned. During the entire trial, which lasted many weeks, not a person examined attempted to defend either the procedure or the judgment of the former court. Most of the old judges laid the blame at the door of Cauchon.

When the trial ended a decree was proclaimed and ordered published in every church in France. Some of its specific findings were:

First: The Bishop of Beauvais had no right to preside at the trial.

Second: Joan was a minor, and could not be tried without a guardian having been appointed for her.

Third: Joan, never having lived in Rouen, could not be tried in that diocese.

Fourth: The court cruelly betrayed and ensnared her into making admissions of criminal conduct.

Fifth: She was pure, gentle, and pious.

Sixth: The voices taught her nothing but good.

Seventh: She wore men's dress to obey a Divine command.

The decree closed with these words: "Finally, in every city of the Kingdom, and in every humble locality, this judgment shall be publicly made known, to be kept in remembrance by all men for all times."

# 19. Benvenuto Cellini, sued at Paris for Highhanded Violence, Loses, his Case,<sup>1</sup>

## *Then Stabs and Disables the Plaintiff to Punish his Effrontery.*

[The narrator—that egotistic, impetuous, wilful, arrogant genius, whose narrow escape when a youth from the death penalty for an attempted homicide is recounted *post*, Chap. 5, is now some forty years of age, and has become so famous that King Francis I of France has taken him into service at Paris, to fill the royal dwellings with all manner of works of art. For the accommodation of Benvenuto's large staff of craftsmen, the King has located him in a part of one of the nearby "castles". But the imperious artist, now wanting more spacious quarters, proceeds in his usual high-handed fashion to turn out some of the other craftsmen already there. This brings him into litigation. His egotistic bias of course makes him give only one side of the story.]

I had a tennis-court in my castle, from which I drew considerable profit. The building also contained some little dwellings inhabited by different sorts of men, among whom was a printer of books of much excellence in his own trade. Nearly the whole of his premises lay inside the castle, and he was the man who printed Messer Guido's first fine book on medicine. Wanting to make use of his lodging, I turned him out, but not without some trouble.

There was also a manufacturer of saltpetre; and when I wished to assign his apartments to some of my German workmen, the fellow refused to leave the place! I asked him over and over again in gentle terms to give me up my rooms, because I wanted to employ them for my workpeople in the service of the King. The more moderately I spoke the more arrogantly did the brute reply; till at last I gave him three days' notice to quit. He laughed me in the face, and said that he would begin to think of it at the end of three years. I had not then learned that he was under the protection of Madame d'Etampes; but had it not been that

1. From *Benvenuto Cellini*, "Autobiography", translated J. Addington Symonds, New York, Pickwick Publishers Co., 18—, Book II, Chap. XXV, p. 277.

the terms on which I stood toward that lady made me a little more circumspect than I was wont to be, I should have ousted him at once; now, however, I thought it best to keep my temper for three days.

When the [three days'] period of my notice was over, I said nothing, but took Germans, Italians, and Frenchmen, bearing arms, and many hand-labourers whom I had in my employ, and in a short while gutted all his house and flung his property outside my castle. . . . I had to deal in like manner with another fellow, but I did not ruin his house; I only threw all his furniture out of doors. This time Madame d'Etampes had the insolence to tell the King: "I believe that devil will sack Paris one of these days." The King answered with some anger that I was only quite right to defend myself from the low rabble who put obstacles in the way of my serving him. . . .

It happened that just at this period an action was brought against me in Paris by the second lodger I had ousted from my castle, who pretended that on that occasion I had stolen a large quantity of his effects. This lawsuit tormented me beyond measure, and took up so much of my time that I often thought of decamping in despair from the country.

Now the French are in the habit of making much capital out of any action they commence against a foreigner, or against such persons as they notice to be indolent in litigation. No sooner do they observe that they are getting some advantage in the suit, than they find the means to sell it; some have even been known to give a lawsuit in dowry with their daughters to men who make a business out of such transactions. They have another ugly custom, which is that the Normans, nearly all of them, traffic in false evidence; so that the men who buy up lawsuits, engage at once the services of four or six of these false witnesses, according to their need; their adversary, if he neglect to produce as many on the other side, being perhaps unacquainted with the custom, is certain to have the verdict given against him.

All this happened in my case, and thinking it a most disgraceful breach of justice, I made my appearance in the great hall of Paris,

to defend my right. There I saw a judge, lieutenant for the King in civil causes, enthroned upon a high tribunal. He was tall, stout, and fat, and of an extremely severe countenance. All round him on each side stood a crowd of solicitors and advocates, ranged upon the right hand and the left. Others were coming, one by one, to explain their several causes to the judge. From time to time, too, I noticed that the attorneys at the side of the tribunal talked all at once: and much admiration was roused in me by that extraordinary man, the very image of Pluto, who listened with marked attention first to one and then to the other, answering each with learning and sagacity. I have always delighted in watching and experiencing every kind of skill; so I would not have lost this spectacle for much. . . .

Well, then, to return to my affairs. When certain decisions of the Court were sent me by those lawyers, and I perceived that my cause had been unjustly lost, I had recourse for my defence to a great dagger which I carried; for I have always taken pleasure in keeping fine weapons. The first man I attacked was the plaintiff who had sued me; and one evening I wounded him in the legs and arms so severely (taking care, however, not to kill him) that I deprived him of the use of both his legs. Then I sought out the other fellow who had brought the suit, and used him also in such wise that he dropped it.

Returning thanks to God for this and every other dispensation, and hoping to be left awhile without worries, I bade the young men of my household, especially the Italians, for God's sake to attend each diligently to the work I set him, and to help me till such time as I could finish the things I had in hand. I thought they might soon be completed, and then I meant to return to Italy, being no longer able to put up with the rogueries of those Frenchmen; the good King, too, if he once grew angry, might bring me into mischief for many of my acts of self-defence [!!]

## 20. Trials before the Revolutionary Tribunal of the Terror, A.D. 1794.<sup>1</sup>

### *Two Hundred Persons a Week sent to the Guillotine.*

[This was the first Tribunal set up during the bloodthirsty period of the Robespierre regime.]

The ensuing regime of the Directory (§ 21) represented a more moderate and settled system of justice.]

The machinery of the Revolutionary Committees, which filled the prisons of Paris, with the assistance and under the superintendence of the Committee of General Security, has been described; the famous Revolutionary Tribunal, which partially emptied those prisons and maintained the influence of the Terror has now to be examined. . . .

The operations of the Revolutionary Tribunal were intended by the organizers of the Terror to frighten the people of Paris and of France into acquiescence in the rule of the Great Committee, by showing them that the result of being suspected or denounced would be not merely a detention in a prison, but very possibly rapid judgment and summary execution. . . . During the Reign of Terror much blood was wantonly shed, yet for the organizers of the system excuses can be made. They honestly believed that the steady succession of executions was necessary to maintain peace and good order in France, and that, to save much bloodshed from anarchy and civil war, it was necessary that some lives should be solemnly taken with judicial forms. This may not be a valid excuse to strict moralists, but it is an intelligible attitude to adopt.

The procedure of the Tribunal was very simple. Before each session was brought for trial, every day, certain prisoners whose names had been decided on in a nightly conference between the Committee of General Security and Fouquier-Tinville (the Public Prosecutor), and who had then been removed from their respec-

1. From G. Lenôtre, "The Tribunal of the Terror", translated by F. Lees, 1909, pp. 189, 236.

five prisons to the Conciergerie, which was close by the Palais de Justice, where the Tribunal held its sittings. The selection of victims was at first a serious matter, prisoners only being chosen for trial who had shown themselves in some way markedly opposed to the Revolution, either as politicians or journalists. But, as the Terror became more organized into a system, less care was shown and names were selected at random from the first that came to hand, the important point being to have a certain number of condemned for the guillotine. . . .

The atrocity of condemnations of large batches of prisoners did not at once commence, and the executions between September, 1793, and March, 1794, were comparatively few to those between March and July, 1794.

The Reign of Terror, though in full operation and action, did not reach its height until the law of 22 Prairial, Year II (June 10, 1794), took away from the prisoners their last chance of a fair trial. . . . This law deprived prisoners on trial of counsel, and in other ways accelerated the action of the Revolutionary Tribunal. From that date until the overthrow of Robespierre on 9 Thermidor (July 27, 1794) the number of victims rapidly increased. . . . From the beginning of October to June 9 (Prairial 21), a period of 36 weeks, 1,165 individuals were condemned to death and executed, an average of over 32 a week; and this increase was gradual, not sudden, as the figures for each month show. For the ensuing period of 7 weeks between June 10 (22 Prairial) and July 27 (9 Thermidor) 1,376 individuals were sent to the guillotine, or an average of over 196 a week. Comment on these figures is needless: they show by themselves how steadily the Reign of Terror increased in severity and to what height it eventually developed.

[At last the reaction took place. Robespierre fell. The Reign of Terror was over. The National Convention voted to re-constitute the Revolutionary Tribunal. Its officers, judges, jurors, and public prosecutors, were deposed, new ones were appointed, and fair rules of procedure were restored.

The deposed officials were then put on trial for their misdoings while in office. Fouquier-Tinville, the public prosecutor, and Scellier, Benoit, and Verney, judges, were among the most notorious. The trial began on March 29, 1795, and lasted forty-five days. More than four hundred witnesses were examined; and the methods of the Tribunal were disclosed in the fullest detail.]

The people of Paris had had strong suspicions as to the sanguinary history of Fouquier-Tinville's Tribunal. The partially revealed horrors had enabled them to conjecture the sinister drama, of which nothing was yet known. The impression given was that these magistrates had been mere executioners; that the sanctuary of justice had, during their term of office, been the scene of terrible crimes. . . . There was now a desire to know everything. It was foreseen that this trial was the trial of the Terror, and that what they were about to learn would avenge all the slandered dead.

Wolf, the former assistant to the clerk of the Court, gave evidence at great length. He related Fouquier's blundering haste, the judges' heedlessness, the jury's cynicism, the silent revolt of his terrorized colleagues, and his terrible nightmare existence. "For at least six weeks," he said, "I witnessed public murders in that Court. If you wish to have proof of that, let the jurymen be given, for a consulting room, the room in the clerk's office where the documents referring to the trials were preserved. Let one of them, blindfolded, take the first file that comes under his hand, and he will find that it contains the sentences of forty or fifty people who were sent to their death after a sitting of but half an hour. It would have taken longer than that time merely to have read the names, etc., of the accused; it would have taken several days to examine all the documents. I say, let even the first file be taken down, and if you do not find the proof of these crimes, unparalleled in history, I will consent to enter the dock in the place of the accused." . . .

The never-ending tragic narratives of the witnesses continued. "On the 22d of Messidor, Scellier was presiding judge. He asked Deselle, one of the accused, if he were acquainted with the con-

spiracy at the prisons. Deselle replied, 'No.' 'I expected that reply,' retorted Scellier; 'are you not a nobleman? And didn't you bear the name of Vicomte?' 'I was formerly given that title,' replied the accused. 'Take the next,' exclaimed the President. This was all the trial there was, and at three o'clock Deselle was guillotined."

And the lamentable procession of witnesses continued. Another woman in black came forward, holding a paper in her hand. Her name was Mme. de Serilly, and she was a widow. "On the 21st of Floreal," she said, "my husband, myself, and twenty other persons were condemned to death. We were merely asked our names, ages, and position. That was the whole of the proceedings. Not one of the accused was heard."

Another witness deposed to Fouquier's methods, when each day's session of his Tribunal was over, and the jurymen were reappearing. The Public Prosecutor would begin to make inquiries as to the day's results. If the "batch" was not a satisfactory one, "You are not on your good behavior!" he would shout; "I must have from two hundred to two hundred and fifty a week!" One day, when six or seven accused, out of fifteen who had been tried in the Salle Saint Louis, were acquitted, he uttered an oath, and shouted: "Who are those bougres of jurymen? Give me a list of their names!" And he repeated: "Give me the names of those bougres. One can no longer count on such men. Here were some safe cases, and we have lost them!" On other occasions, when the sittings were "good," he was sweet as honey. "The last ten days did not show a bad result," he used to say. "During this one we must have four hundred—four hundred and fifty! Come now, my bougres, you must make things hum".

[The sole plea of the accused was that they had merely acted as officers of justice doing their duty, as they saw it, in execution of authority given them by the law.] Fouquier would stubbornly repeat, "You are making me responsible for the Court's judgments!" This was his great argument. He clung to it tenaciously, knowing, as an old lawyer, the respect which the law accords to a

Court's judgment. He made as much of this as he could. . . . Most of the time he took refuge behind the legal jurisdiction of the Revolutionary Tribunal to try all the persons condemned by them. . . . "It is not I," he insisted, "who ought to have been brought here, but the chiefs whose orders I executed. I merely acted in accordance with laws passed by a Convention invested with every power." . . . . One of his fellow-accused put the same idea much more strikingly: "We were but the axe," he said; "do you put an axe on its trial?" . . . . "I complied with the Law of the 22d of Prairial," pleaded Scellier, the ex-judge.

There was, indeed, no other excuse for them, except, perhaps, the Terror, and, knowing this, they rather clumsily invoked it. "The judges were like logs!" shouted Scellier. "At that time everybody would have voted as we did!" insinuated Renaudin. And, when loud murmurs greeted his words, he went on to say, "I am well aware that this audience is differently composed from what it was then, and that public opinion has undergone a great change." "Yes! yes!" shouted the people on all sides. . . .

The various speeches of the defense occupied the sittings of the 5th of May, 1795. . . . President Liger let them finish. He then summed up the case; and at seven o'clock the jury retired into its room to consider upon its verdict. . . . By the terms of the law "the accused, if they did the acts charged, could only be acquitted if the jury found that the acts had been done in good faith or without malice." The jurymen remained in consultation for seventeen hours. On the 6th, at noon, they returned into court.

. . . President Liger then began to read the long verdict of the jury, informing each of the accused as to his fate. "As regards Fouquier-Tinville," he said, "the verdict of the jury finds that he was principal and accomplice in the acts with which he is charged, and that he acted with malice." . . . . Leroy "Dix-Aout," Prieur, Chatelet, Girard, Lanne, Boyenval, Benoit, Depaumier, and Verney were also named among those included in this ver-



dict. . . . The sentence of execution sent them to the guillotine "tomorrow, the eighteenth of Floreal, at nine o'clock in the morning." . . .

This trial of Fouquier-Tinville and his associates marked the end of the Revolutionary Tribunal. On March 20th, 1795, Boissy d'Anglas . . . had proposed the setting aside of all verdicts subsequent to the 22d of Prairial, 1794. . . . The Convention unanimously approved Lanjuinais' statement that "it was necessary to acknowledge that all the persons executed since that date by the Tribunal, whether innocent or guilty, had been, not tried, but judicially murdered."

This was the condemnation of the institution.

#### 21. A Trial under the Directory, A.D. 1797.<sup>1</sup>

##### *The Pope's Nuncio is acquitted, midst Popular Acclaim.*

[Monseigneur De Salamon, the author of these Memoirs, was indebted to his position as a clerical councillor in the Parliament of Paris for the favor with which he was regarded by Pius VI, who appointed him "internuncio" of the Pope at Paris toward the end of the year 1790. The Memoirs are divided into three parts, the first treating of the internuncio's imprisonment at the Abbaye with a number of Catholic priests, nearly all of whom perished in the terrible September massacres. . . . The third part is devoted to events occurring under the Directory, Mgr. de Salamon's correspondence with the Pope having caused his arrest and trial on the charge of conspiracy against the government.]

I was charged with a capital crime, and for about five months I was confronted by an adversary bent on sending me to the guillotine,—the terrible Directory.

To believe my accusers, I was the chief of the most skilfully-devised conspiracy that had ever been invented, and twelve port-

1. From *Monseigneur De Salamon*, "Unpublished Memoirs of the Internuncio at Paris during the Revolution 1790-1801", ed. Abbé Bridier, Book III, Chaps. I, III, IV, VII, VIII, IX, pp. 214-290 in part; Boston, Little, Brown & Company, 1896.

folios, discovered in my rooms at Paris and Passy, afforded indubitable proofs of this conspiracy. In short, I was involved in such a critical situation, that I was abandoned by everybody, even by my closest friends.

In 1790, after the flight of Dugnani, I had been named by the late Pope Pius VI internuncio to Louis XVI. Obligated to perform all the functions of Nuncio Apostolic, I received, in my official capacity, the various briefs of his Holiness directed against the Civil Constitution of the Clergy, and transmitted them, in the canonical forms, to the metropolitan archbishops, of whom there were still many in France, charging the latter to make them known to their respective suffragans. On my side, I gave these briefs the widest possible publicity, and had them translated into French and printed, in spite of the decree of the National Assembly which pronounced the penalty of death against all who "published, printed, or distributed" briefs or other acts emanating from the Court of Rome. . . .

Until 1796, I was able to fulfil my mission undisturbed, and almost without interruption. In the same year, the Directory seemed inclined to enter into negotiations with the Pope, and even made overtures to him, through the medium of the Marquis del Campo, ambassador of Spain. . . . The object was to conclude a concordat between the Pope and the Directory. The Directory was willing to make many concessions, if the Pope consented to sanction the Civil Constitution of the Clergy. . . . Such was the basis of the concordat offered by the Directory. It was, in fact, already *printed*, but a new oath was required from the bishops and priests. This oath displeased Pius VI., and he refused firmly to accept the proposal.

Immediately the Directory broke off all negotiations; the Abbé Pierracchi was ordered to depart in twenty-four hours, and I received a hint that it would be better for my health to keep out of the way for a time. . . .

I was congratulating myself on my foresight in sending a courier to the Pope, and thinking that this same courier was making his way successfully through Switzerland, when all of a sudden Ma-

dame Blanchet entered my room—we lived then in the Rue Florentin—and said: “Monsieur, there are three men belonging to the police below; they want to see M. Eysseri Blanchet.” . . . Blanchet and I were conducted between four men to the police station. . . . At length, I was led into an old-time dungeon, for it was underground and had to be reached by a staircase. . . . I remained in this horrible dungeon an entire week, seemingly abandoned by all creation, when suddenly the door was flung back with a great noise: this occurred about the middle of the day. . . . On the morning of the eleventh day of my imprisonment, I was informed that I must undergo my first examination.

Thus, in my case, the law was violated which enacts that a prisoner be examined within twenty-four hours after his arrest. The delay, doubtless, arose from the fact that they were unable to find sufficient evidence against me, and they hoped to discover in the letters that were likely to arrive from Rome fresh matter for my condemnation. . . .

At length after an imprisonment of twenty-one days, I was summoned to appear before the tribunal whose office it was to investigate the charges against me. . . . The name of the president was Legras. I had formerly had some intercourse with him. He addressed me at once, saying: “Here are your ‘letters.’” He pointed to two: one for Cardinal Antonelli, the Dean of the Sacred College; the other for Cardinal Frangini, Patriarch of Venice, who was my intimate friend. I became acquainted with him at Paris, when I was Auditor of the Rota. “It is by your despatches,” resumed Legras, “that you will be judged. I do not care at present to subject you to a disagreeable examination. Accordingly, you are going to be transferred to a legal prison, where you will await our decision.” . . .

I was conducted to the Grande Force. It was the most important of the prisons destined for robbers and assassins. . . .

At length came the moment when I must appear before the tribunal which was to deal with my case. . . . I was ushered into the presence of the president; he asked me a few questions and said: “You can now withdraw; you will know your fate

to-morrow.” . . . On the next day, just as I had finished my chocolate, an usher entered and notified me that there was sufficient evidence to hold me, and that I should be transferred on the next day to the prisons of the Conciergerie, bordering on the Palais, there to await my trial. . . .

I had been now five weeks at the Conciergerie, and, but for the deprivation of my liberty, I might have felt quite happy. I was well fed and allowed to receive the visits of my friends. But at length I was notified that I must appear at the Registry of the Palais de Justice, in order to receive the list of my jurors. . . . At length, I was summoned, and the list of the jurors was placed in my hand. It contained a dozen names. I was told I had twenty-four hours in which to accept or reject them, but, in the latter case, the trial would be adjourned for a month, for it is only every month that the names of the jurors are drawn by lot.

Although I was not acquainted with any of them, I answered that I wished to be tried and would run the risk of accepting them, even if they were badly disposed in my regard.

On the next day, I was led into court.

The charge against me was of a somewhat unusual character, and so an extraordinary tribunal had been instituted for its trial, as when crimes of an abnormally serious character are to be judged.

This arrangement was as little calculated to reassure me as was the dismal procession which accompanied me to the bar, and which was composed of the jailer of the Conciergerie, two ushers, and two turnkeys in front, with two gendarmes, armed to the teeth, bringing up the rear. . . . The judges soon took their seats. The presiding justice was Gohier, a renowned Jacobin, and afterward one of the five Directors. The twelve jurors were in front of me. At the right of the judges, sat the public prosecutor and his ushers, and, on the left, but a little lower down, the commissary of the Directory, who was called Boulanger.

It was in every respect an unprecedented trial. There was actually no charge against me; neither complainant nor witness was on hand to accuse me; but I had to confront the terrible power that persecuted me,—the Directory. . . .

When all were seated, citizen Legras read the indictment, which he himself had drawn up. This individual, who had treated me with seeming respect and politeness at the time I was leaving the police station, preferred the most abominable charges against me in this document. If I had been a felon, blackened with every crime in the calendar, he could not have indulged in more loathsome assaults on my character. He missed his mark, however; the reading was heard with angry and prolonged murmurs by the audience.

When he had finished, the commissary of the Directory rose and said:—"The commissary who has drawn up the indictment has not seized the point of the accusation precisely, and has not stated plainly the crime of the prisoner. He is not accused of conspiracy, but of corresponding with the enemies of the State. I require, therefore, that the indictment be quashed and a new one drawn up on a different basis. Consequently I must ask for an adjournment, and that the accused be remanded."

I did not wait for the decision of the judges, and I demanded to be heard.

"Prisoner," replied the president, "you are at liberty to speak."

"So then," I said. . . . "I insist on my trial being proceeded with, and that immediately; at least, I shall have the advantage and the consolation of knowing that the jurors in whose presence I am, and who are to decide on my fate, are men of the highest respectability and worth. . . . I demand that the indictment be maintained in its integrity. . . . My counsel is here present, and will support my demand."

M. Bellart was my counsel. I had requested him to advise me, for I was unacquainted with the new forms of criminal procedure; and also to aid me in my defence, for I had the fullest confidence in his ability.

But all our efforts were vain; we had to succumb. The indictment was quashed; I was led back to the Conciergerie, where the clerk informed me I was to be transferred to La Force. . . .

My second month in jail passed off in pretty much the same way as the first. . . . A month and even five weeks slipped by, and then I was again invited to the Palais, to examine the list of my jurors. . . . After receiving the list of my jurors, I returned hastily, in order to read it and let M. Richard [a friendly officer of the Court] see the names. He read it attentively, and remained for some time silent. At length, he said,—“This alarms me; these jurors are not at all as good as the first.” “No matter!” I answered, “I must take them as they are. This uncertainty is killing me. I want to be tried, come what may!” . . .

On the morning of the second day after, I descended through the same dark staircase, and sat again on the same shameful bench, which was reserved for the greatest criminals. When everybody was seated and the court declared open, the commissary of the Directory said,—“I demand that the case be adjourned for another month.”

No sooner were the words out of his lips than a terrible tumult arose in the hall, and the audience hissed with great heartiness.

I myself rose, and, without asking the President's permission, I said,—“I pray you, then, citizen judges, to order that no adjournment be permitted; and that, in spite of the demand of the commissary Boulanger, my trial be proceeded with immediately.”

My counsel followed me, and did so with all the eloquence for which he is famed. . . . After a long deliberation, they adjourned the case to the month following. . . .

The end of the month arrived without the occurrence of any event of importance, and I went to the clerk's office for the third time to get my list of jurors. When I communicated their names to Richard, he said,—“Such a list must have been made out with the design of ruining you. These men are still worse than the preceding ones, and a majority of ten is required to bring in a verdict in your favor. You ought to refuse them.” . . . Richard came to my help a second time, and after a great deal of hesitation we finally made up a list which offered us some guaranty of honesty and impartiality. I remember that among the

names inscribed were those of General de Tolosan; M. Charel, a goldsmith; Cadet, a private gentleman; Charpentier, a notary; Leblanc de Varennes, a lawyer; and Lecouteux-Lenormand.

When all was over, this excellent usher [Richard] said: "I am about to attempt a bold stroke that will cost me my place if it be discovered. But I would do anything to save an honest man like you. I am going to summon these jurors just as if their names had been drawn by lot. I have some hopes that no one will detect the substitution; the president is not likely to remember the features of every juror that comes before him." I could hardly find words to express my gratitude, and when we had taken our coffee and liqueur, he left, carrying with him the list we had agreed on. . . .

At last the decisive hour was about to strike. It was now the 3d of March, and the court was to open at eight in the morning. My counsel, M. Bellart, entered a moment after. He looked very pale and distressed.

"What is the matter, M. Bellart?" I asked. "Your face does not look as if you had good news to announce. And yet I have been depending on you to give me courage!"

"Alas," he answered, "what can I tell you, except that from feeble and prejudiced judges everything is to be feared!"

At this moment I received a summons from Richard to be ready to appear in Court. . . . As soon as the judges were seated, the indictment was read. It was conceived in much more moderate terms than the previous one,—possibly because Legras had had nothing to do with drawing it. It charged me simply with the crime of corresponding with the Pope, not with that of being the leader of a conspiracy. . . .

This same commissary of the Directory rose again and demanded that I should be handed over for trial to a military commission! He stated that my case should be dealt with by some such body rather than by the present tribunal, for the crime with which I was really charged was not that of conspiracy, neither was it that of corresponding with the Pope,—it was simply that of being a spy.

This unexpected requisition at first created a sort of stupefaction throughout the hall. But no sooner did the audience recover from their surprise than such a violent outcry arose against the commissary that the president could not obtain silence. "They want to assassinate him!" cried some; others shouted: "They shall not send him before a military commission." . . . Thereupon, M. Bellart [my counsel] addressed the commissary: "Oblige me," he said, "by showing me the text of the law of which you speak, I am not acquainted with it, but I promise you I'll discuss every article of it."

He did so, in fact, in the most luminous manner, and ended his discourse with a moving peroration, the concluding words of which were,—"Remember, citizen judges, that, if you have not had the good fortune to be elected by the people, you have now an opportunity at least of showing yourselves worthy of such an honor." The reason why he made this allusion was that my judges had been appointed by the Directory, in open violation of the constitution, and we were on the eve of the primary assembly, when new elections would take place. Consequently, not only did the words of M. Bellart call forth applause in the body of the court, but they made a profound impression on the judges themselves, and, perhaps, excited a little apprehension among them also.

Feeling the necessity, therefore, of taking the matter at once under consideration, and being undoubtedly intimidated by public opinion, they decided, after a deliberation lasting an hour and a quarter, that they had jurisdiction, and that the case should be tried immediately.

This decision aroused such enthusiasm that the president was beside himself. He was terribly agitated, and cried with all his might that the law expressly forbade all expressions of approbation or disapprobation.

At length calm was restored. The indictment was read a second time, and, as the prosecution had no witnesses, the municipal officials of Passy offered to testify to my conduct and morality. The Court, however, declared this was not necessary.

Then the president, taking my letter in his hand, said,—“Prisoner, the main foundation on which the charge against you rests is this letter.” . . . I consented to the production of my letter.

Then there ensued a sort of dialogue between me and the president. He put a number of questions to me, and I answered them with more or less warmth, in proportion to the degree to which they aroused my indignation. . . . The president resumed:—

“You are the enemy of the Republic; you have refused to take the oaths.”

“I am not an enemy of the Republic. . . . I have never excited any one against the Republic, for I disdain revenge. . . . As I was not a public functionary, I was under no obligation to take the oath to the Civil Constitution of the clergy. . . . As to the oath of Liberty and Equality, I never could see that I needed to take it. . . . But if you charge me with want of fidelity to the laws of the Republic, I answer that I obey these laws faithfully, and you cannot ask me to do more.”

Then came the turn of my counsel.

His speech was a splendid effort. He dwelt at length upon my answers, and spoke exhaustively on those passages of my letter which were to my advantage. . . .

The president adjourned until nine o'clock the next morning. . . . My counsel came early in the morning. His first words to me were,—“Be of good courage!” “Ah!” I answered, “you never thought of saying that to me yesterday, when I had far more need of it!”

“Yesterday [he said] I was almost certain you were lost. One of the judges assured me in the most unequivocal terms that you were to go before a military commission, and that was why you saw me so downcast. I thought that all our methods of defence would be useless. They have not dared to do this, owing to the feeling displayed by the audience in your behalf. You are indebted for your safety to the good will of the people!”

“Permit me [said I] to add also that you spoke with much eloquence, and said just what you ought to say.”

We left for court at nine o'clock precisely. . . . The public prosecutor denounced me in a most violent harangue, and concluded by insisting that I should be condemned to capital punishment.

Then the president put the usual questions to the jurors. They were couched in the following terms:

“Has there been a correspondence with the enemies of the State?”

“Is the prisoner guilty of this crime?”

“Has he acted with evil intention?”

The jurors deliberated for a long time. . . . After two hours' deliberation the jury returned into court with their verdict. To the first two questions the answers were in the affirmative; to the last, in the negative.

The president was therefore compelled to discharge me.

*Chapter 4*  
**GERMANY**

## Chapter 4

22. *The Free Field Court in Old Saxony.  
Its Proceedings are Voiced in Rhyme.*
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## GERMANY

### 22. The Free Field Court in Old Saxony.<sup>1</sup>

#### *Its Proceedings are Voiced in Rhyme.*

The "Frey Feldgericht," or Free Field Court of Corbey [in Saxony], was, in pagan times, under the supremacy of the priests of the Eresburgh, the temple which contained the Irminsule, or pillar of Irmin. After the conversion of the people, the possessions of the temple were conferred by Louis the Pious upon the Abbey which arose upon its site.

The Court was composed of sixteen persons, who held their offices for life. The senior member presided as the Gerefa or Graff; the junior performed the humbler duties of "Frohner," or summoner; the remaining fourteen acted as the "Echevins" or jurors, and by them all judgments were pronounced or declared. When any one of these died, a new member was elected by the priests, from amongst the twenty-two septs or families inhabiting the Gau or district, and who included all the hereditary occupants of the soil. Afterwards, the selection was made by the monks, but always with the assent of the Graff and of the "Frohner."

The seat of judgment, the King's seat, or "Königsstuhl," was always established on the greensward; and we collect from the context that the tribunal was also raised or appointed in the common fields of the Gau, for the purpose of deciding disputes relating to the land within its precinct. Such a "King's seat" was a plot sixteen feet in length and sixteen feet in breadth; and when the ground was first consecrated, the Frohner dug a grave in the centre, into which each of the Free Echevins threw a handful of ashes, a coal, and a tile. If any doubt arose whether a place of judgment had been duly hallowed, the judges sought for the

1. From Sir Francis Palgrave, "The Rise and Progress of the English Commonwealth," London, John Murray, 1832; Part II, p. cxliv.

tokens. If they were not found, then all the judgments which had been given became null and void. It was also of the very essence of the Court that it should be held beneath the sky and by the light of the sun. All the ancient Teutonic judicial assemblies were held in the open air.

When a criminal was to be judged, or a cause to be decided, the Graff and the Free Echevins assembled around the "Königstuhl;" and the "Frohner," having proclaimed silence, opened the proceedings by reciting the following rhymes:—

"Sir Graff, with permission,  
I beg you to say,  
According to law, and without delay,  
If I, your knave,  
Who judgment crave,  
With your good grace,  
Upon the King's seat this seat may place."

To this address the Graff replied:—

"While the sun shines with even light  
Upon masters and knaves, I shall declare  
The law of might, according to right.  
Place the King's seat true and square;  
Let even measure, for justice' sake,  
Be given in sight of God and man,  
That the plaintiff his complaint may make,  
And the defendant answer—if he can."

In conformity to this permission, the "Frohner" placed the seat of judgment in the middle of the plot, and then he spake for the second time:—

"Sir Graff, Master brave,  
I remind you of your honour here,  
And moreover, that I am your knave;  
Tell me, therefore, for law sincere,  
If these mete-wands are even and sure,  
Fit for the rich and fit for the poor,  
Both to measure land and condition;  
Tell me as you would eschew perdition."

And so speaking, he laid the mete-wand on the ground. The Graff then began to try the measure, by placing his right foot against the wand, and he was followed by the other Free Echevins in rank and order, according to seniority. The length of the mete-wand being thus proved, the "Frohner" spake for the third time:—

"Sir Graff, I ask by permission,  
If I, with your mete-wand may mete  
Openly, and without displeasure,  
Here the King's free judgment seat."

And the Graff replied:—

"I permit right,  
And I forbid wrong,  
Under the pains and penalties  
That to the old known laws belong."

Now was the time of measuring the mystic plot; it was measured by the mete-wand, along and athwart, and when the dimensions were found to be true, the Graff placed himself in the seat of judgment, and gave the charge to the assembled Free Echevins, warning them to pronounce judgment according to right and justice.

"On this day, with common consent,  
And under the clear firmament,  
A free field court is established here,  
In the open eye of day;  
Enter soberly, ye who may.  
The seat in its place is right,  
The mete-wand is found to be right;  
Declare your judgments without delay;  
And let the doom be truly given,  
Whilst yet the sun shines bright in heaven."

Judgment was then given by the Free Echevins according to plurality of voices.



### 23. The Medieval Vehm-Gericht in Old Westphalia.<sup>1</sup>

#### *The Hooded Tribunal Tries in Secrecy.*

Westphalia, according to its ancient constitution, was divided into districts called "Freygraffschafften," each of which usually contained one, and sometimes many, Vehmlic tribunals, whose boundaries were accurately defined. The right of the "Stuhlherr," or Lord, was of a feudal nature, and could be transferred by the ordinary modes of alienation; and if the Lord did not choose to act in his own person, he nominated a "Freigrav" to execute the office in his stead. The Court itself was composed of "Freyschoppfen," Scabini, or Echevins, nominated by the Graff, and who were divided into two classes: the ordinary, and the "Wissenden" or "Witan," who were admitted under a strict and singular bond of secrecy.

The initiation of these, the participators in all the mysteries of the tribunal, could only take place upon the "red earth," or within the limits of the ancient Duchy of Westphalia. Bareheaded and ungirt, the candidate is conducted before the dread tribunal. He is interrogated as to his qualifications, or rather as to the absence of any disqualification. He must be free born, a Teuton, and clear of any accusation cognizable by the tribunal of which he is to become a member. If the answers are satisfactory, he then takes the oath, swearing by the Holy Law that he will conceal the secrets of the Holy Vehme from wife and child—from father and mother—from sister and brother—from fire and water—from every creature upon which the sun shines, or upon which the rain falls—from every being between earth and heaven.

Another clause relates to his active duties. He further swears that he will "say forth" to the tribunal all crimes or offences which fall beneath the secret ban of the Emperor, which he knows to be true, or which he has heard from trustworthy report; and that he will not forbear to do so, for love nor for loathing, for gold nor for silver nor precious stones.

1. From Sir Francis Palgrave, "The Rise and Progress of the English Commonwealth," London, Murray, 1832; Part II, p. cxix.

The reader will recall that in "Anne of Geierstein" Sir Walter Scott depicted a trial before the Vehmgericht.

This oath being imposed upon him, the new Freischopff was then intrusted with the secrets of the Vehmlic tribunal. He received the password, by which he was to know his fellows, and the grip or sign by which they recognized each other in silence; and he was warned of the terrible punishment awaiting the perjured brother. If he discloses the secrets of the court, he is to expect that he will be suddenly seized by the ministers of vengeance. His eyes are bound, he is cast down on the soil, his tongue is torn out through the back of his neck; and he is then to be hanged seven times higher than any other criminal. And whether restrained by the fear of punishment, or by the stronger ties of mystery, no instance was ever known of any violation of the secrets of the tribunal.

Thus connected by an invisible bond, the members of the "Holy Vehme" became extremely numerous. In the fourteenth century the league contained upwards of one hundred thousand members. Persons of every rank sought to be associated to this powerful community, and to participate in the immunities which the brethren possessed. Princes were eager to allow their ministers to become the members of this mysterious and holy alliance; and the cities of the Empire were equally anxious to enroll their magistrates in the Vehmlic union.

As the Echevins were of two classes, uninitiated and initiated, so the Vehmlic Courts had also a twofold character: the "Offenbare Ding" was an open court or Folkmoot; but the "Heimliche Acht" was the far-famed Secret Tribunal.

The first was held three times in each year. According to the ancient Teutonic usage, it usually assembled on Tuesday, anciently called "Dingstag," or court-day, as well as "Dienstag," or serving-day, the first open or working day after the two great weekly festivals of Sun-day and Moon-day. Here all the householders of the district, whether free or bond, attended as suitors. The "Offenbare Ding" exercised a civil jurisdiction; and in this Folkmoot appeared any complainant or appellant who sought to obtain the aid of the Vehmlic tribunal, in those cases when it did not possess that summary jurisdiction from which it has obtained such fear-

ful celebrity. Here also the suitors of the district made presentments, or "wroge," as they are termed, of any offences committed within their knowledge, and which were to be punished by the Graff and Echevins.

The criminal jurisdiction of the Vehmic tribunal took the widest range. The "Vehme" could punish mere slander and contumely. Any violation of the Ten Commandments was to be restrained by the Echevins. Secret crimes, not to be proved by the ordinary testimony of witnesses, such as magic, witchcraft, and poison, were particularly to be restrained by the Vehmic judges; and they sometimes designated their jurisdiction as comprehending every offence against the honour of man or the precepts of religion.

The Echevins, as conservators of the Ban of the Empire, were bound to make constant circuits within their districts, by night and by day. If they could apprehend a thief, a murderer, or the perpetrator of any other heinous crime in possession of the "mainour," or in the very act, or if his own mouth confessed the deed, they hung him upon the next tree. But to render this execution legal, the following requisites were necessary: fresh suit, or the apprehension and execution of the offender before daybreak or nightfall; the visible evidence of the crime; and lastly, that three Echevins at least should seize the offender, testify against him, and judge of the recent deed.

If, without any certain accuser, and without the indication of crime, an individual was strongly and vehemently suspected, or when the nature of the offence was such as that its proof could only rest upon opinion and presumption, the offender then became subject to what the German jurists term the inquisitorial proceeding; it became the duty of the Echevin to denounce the "Leumund," or manifest evil fame, to the secret tribunal. If the Echevins and the Freygraft were satisfied with the presentment, either from their own knowledge, or from the information of their compeer, the offender was said to be "verfampt"—his life was forfeited; and wherever he was found by the brethren of the tribunal, they executed him without the slightest delay or mercy. An of-

fender who had escaped from the Echevins was liable to the same punishment; and such also was the doom of the party who, after having been summoned pursuant to an appeal preferred in open court, made default in appearing.

But one of the "Wissenden" was in no respect liable to the summary process, or to the inquisitorial proceeding, unless he had revealed the secrets of the Court. He was presumed to be a true man; and if accused upon vehement suspicion, or "Leumund," the same presumption or evil repute which was fatal to the uninitiated might be entirely rebutted by the compurgatory oath of the free Echevin. If a party, accused by appeal, did not shun investigation, he appeared in the open court, and defended himself according to the ordinary rules of law. If he absconded, or if the evidence or presumptions were against him, the accusation then came before the judges of the Secret Court, who pronounced the doom.

The accusatorial process, as it was termed, was also, in many cases, brought in the first instance before the "Heimliche Acht." Proceeding upon the examination of witnesses, it possessed no peculiar character, and its forms were those of the ordinary courts of justice. It was only in this manner that one of the "Wissenden" or Witan could be tried; and the privilege of being exempted from the summary process, or from the effects of the "Leumund," appears to have been one of the reasons which induced so many of those who did not tread the "red earth" to seek to be included in the Vehmic bond.

There was no mystery in the assembly of the Heimliche Acht. Under the oak, or under the lime-tree, the judges assembled in broad daylight, and before the eye of heaven; but the tribunal derived its name from the precautions which were taken for the purpose of preventing any disclosure of its proceedings which might enable the offender to escape the vengeance of the Vehme. Hence, the fearful oath of secrecy which bound the Echevins. And if any stranger was found present in the court, the unlucky intruder instantly forfeited his life as a punishment for his temerity. If the presentment or denunciation did chance to become

known to the offender, the law allowed him a right of appeal. But the permission was of very little utility, it was a profitless boon, for the Vehmic judges always laboured to conceal the judgment from the hapless criminal, who seldom was aware of his sentence until his neck was encircled by the halter.

If we examine the proceedings of the Vehmic tribunal, we shall see that, in principle, it differs in no essential character from the summary jurisdiction exercised in the townships and hundreds of Anglo-Saxon England. Amongst us, the thief or the robber was equally liable to summary punishment, if apprehended by the men of the township; and the same rules disqualified them from proceeding to summary execution. An English outlaw was exactly in the situation of him who had escaped from the hands of the Echevins, or who had failed to appear before the Vehmic Court; he was condemned unheard, nor was he confronted with his accusers. The inquisitorial proceedings, as they are termed by the German jurists, are identical with our ancient presentments. Presumptions are substituted for proofs, and general opinion holds the place of a responsible accuser. He who was untrue to all the people in the Saxon age, or liable to the malcredence of the inquest at a subsequent period, was scarcely more fortunate than he who was branded as "Leumund" by the Vehmic law.

In cases of open delict and of outlawry, there was substantially no difference whatever between the English and the Vehmic proceedings. But in the inquisitorial process, the delinquent was allowed, according to our older code, to run the risk of the ordeal. He was accused by or before the Hundred, or the Thanes of the Wapentake; and his own oath cleared him, if a true man; but he "bore the iron" if unable to avail himself of the credit derived from a good and fair reputation.

The Vehmic tribunals can only be considered as the original jurisdictions of the "Old Saxons," which survived the subjugation of their country. The singular and mystic forms of initiation, the system of enigmatical phrases, the use of the signs and symbols of recognition, may probably be ascribed to the period

when the whole system was united to the worship of the Deities of Vengeance, and when the sentence was promulgated by the Doomsmen, assembled, like the Asi of old, before the altars of Thor or Woden.

#### 24. The Farmers' Tribunal in Old Bavaria.<sup>1</sup>

##### *A Midnight Charivari for Undesirable Neighbors.*

In the list of peculiar institutions of the Old World which have passed out of existence is the "Haberfeldtreiben" of Upper Bavaria. This was a singular sort of tribunal, a court of *exposé*, one may term it, which had its beginning away back in the ninth century, and flourished down to so recent a year as 1868.

The word "Haberfeldtreiben" signifies literally "driving over the oat-field," and for its application to the institution we must look far back into history. There we find that it was the practice of this body in the olden days to punish those who were found guilty before it by driving them barefoot and in their night clothes over the stubble in the oat-fields, with pursuers close behind plying birch rods to urge them to greater speed. . . . A young peasant of the country, writing to a friend in Germany in 1867, gives us the history in a nutshell: "It is an old custom, coming down from the time of Karl the Great," he writes, "and its use is to correct the bad conduct of the upper classes, and of some of the other people who cannot be reached by the ordinary means of law. As there are more rogues now than there used to be," he adds, "we have had lately more 'drivings into the oat-field.'"

The Haberfeldtreiben had its representatives in all the villages and towns in Upper Bavaria. Each district had a president or Habermeister, and he had numerous subordinates. . . . Each Meister had his council, composed of eight chosen men called Elders. Then came the Haberer or ordinary members, all of whom, and the officers as well, had to be men of spotless character. . . .

1. From *George H. Westley*, "A Strange Tribunal of Bavaria", *The Green Bag*, 1898, vol. X, p. 352.

The crimes and offences which came within the jurisdiction of the Haberfeldtreiben were these: incontinence, usury, slander, the use of false weights and measures, the adulteration of food and beer, and, according to one writer on the subject, "the introduction of machinery whereby human labor is rendered unnecessary."

But the most curious feature of this tribunal was its method of procedure. The meetings were held an hour before midnight and on some spot secure from interruption, usually some half-ruined chapel. The eight elders seated themselves in a semi-circle, with the Meister on a raised seat in the middle. In his right hand the latter held his staff, and in his left some ears of corn. Everything being ready, he opened the proceedings by saying in a loud voice:—

"It is thus resolved, ye Elders of the Leisach, Mangfall, and Schlierach! According to right and custom a Haberfeldtreiben is to take place in our district. In the Emperor's name I charge you to send forth messengers between this day and the day of the new moon, in order that all evil deeds done in secret, which are a disgrace to the district, may be duly censured and punished. Let none know the names of the victims, for, according to the ancient saying, 'Justice shall come like fire at midnight.' Do ye therefore keep sign and watchword according to your oath. And now I proclaim my summons to the four winds of Heaven. Whosoever has a complaint to lay before the Emperor and the Habengericht, let him appear, lodge his complaint, and bring his evidence ere I strike the ground three times with my staff."

The accuser then stepped forward and cried: "Herr Richter, I accuse! I accuse!" whereupon the Meister inquired his name and that of the subject of his complaint. Having learned these things, he demanded proof of the truth of the accusation, and when this was given, all the Haberer rose, and the Meister said:—

"Once more I ask of thee, before our Lord God, and in the name of the Emperor, complainant, dost thou abide by thine accusation?"

"I do abide!"

"Should it be false, wilt thou be answerable with flesh and blood, with honor and property?"

"I will!"

"Then do I demand for the third time, Is there any one in this court who can plead for the accused?"

If no voice was raised to defend the absent one, the Meister then turned to one of the elders and said: "Rugmeister, I deliver him over to thee, even as I reject these ears of corn and cast them on the ground. Do thou see that he escapes not punishment. Now away with all to the four winds. Lead the complainant forth and then disperse." . . .

In the depth of night the people of the village would be startled from their slumber by a sudden and tremendous uproar, a perfect pandemonium, an acoustic chaos from tin pans, trumpets, cow-horns, bells, whistles, drums, and firearms, and rising hastily they would find one of the houses surrounded by the Haberer. . . . Presently a shrill whistle sounded over the din, and instantly all became silent. Then the crier of the tribunal stepped forward and proclaimed—

"This is the Haberfeldtreiben;

To all of every station, we hereby state—

And Kaiser Karl must sign the declaration!

The Haberfeldtreiben now are here

Keep silence all within and hear;

Give heed to every fire and light

Lest harm should come to you this night;

But first we'll read aloud the list,

To see that none of us is missed."

Every member had a fictitious name, derived from some old celebrity, and these names were now read over: Prince Eugene, Joseph the Second, the Bishop of Brixen, the Magistrate of Tölz, Napoleon, Andreas Hofer, King Max, the Forester of Bayrebrunn, and names of such sort were called, and each answered to with a loud "Here!" for oddly enough should anyone fail to answer distinctly to his fictitious name, the whole affair would be declared

illegal, and the court would immediately disperse. There is a legend among the peasants that there was always an extra member present on these occasions, and that was the Devil himself.

The roll-call being over, the culprit was commanded to come forth into the light of the lantern, and listen to the tale of his misdeeds. Knowing that there was no escape from the ordeal, he would do so, and then the Rugmeister read out in a loud voice a doggerel composition detailing the crimes and offences of which he had been found guilty. After he had been thus publicly shamed and disgraced by the exposure of his secret vices, he was allowed to retire; after which the crier gave the parting lines as follows:—

“Goodbye to you all, be honest and wise,  
We must go, for a journey before us lies.  
If you dislike the music we’ve made,  
No money, remember, to hear it you’ve paid.  
Take heed to improve your deeds and ways,  
Or we shall return before many days.  
One of us must, ere this night be o’er,  
In the Untersberg Kaiser Karl implore  
To record this history without fail,  
Lest we should chance to forget the tale.”

This concluded, the trumpets were again blown, the drums beaten, the guns fired, and after one final and terrific burst of noise, the lantern was suddenly extinguished, and the Haberer dispersed and stole away as quietly as they had gathered. . . .

The disgrace of being the subject of a Haberfeldtreiben was held by the people to be indelible, and few had the courage to remain in the neighborhood after being thus visited. Many an unjust official or undesirable neighbor was got rid of in this way, and so the institution while it was to a certain extent a terror, was at the same time a benefit to the community.

## 25. King Frederick the Great's Judgment upon his Judges for an Unjust Judgment.<sup>1</sup>

### *The Case of Arnold the Poor Miller.*

[In the year 1759 at Züllichau, on a petty stream trickling into the river Oder, in Silesia, lay the mill of one Arnold, whose forefathers for many generations had earned their living in grinding meal for their neighbors. The landlord of this humble possession was one Major Count von Schmettau. In 1762 the son Arnold bought the Mill from the father. In 1770, one Baron von Gersdorff, having an estate upstream from the Mill, started to breed fish, laid a weir across the stream to make a fishpond, and thus cut off the water from the Mill. By 1773 the Arnolds defaulted in their rent, because they were unable to work their mill. So their landlord, after tedious litigation, in 1778, at the town of Cüstrin, succeeded in evicting the Arnolds and auctioning the Mill for the arrears of rent. Meantime, their efforts to sue von Gersdorff, who had ruined their water-supply, were fruitless.

But the son's wife, Rosine, in 1779, succeeded in getting a petition to the King's Cabinet for redress. The Cabinet sent it to the Department of Justice, which however could find no error in the proceedings.

Later she petitioned the Grand Chancellor, Fürst; but he paid no attention.

Meanwhile, the Arnolds, still persistent, again petitioned the King's Cabinet for a special commission to investigate. One of the two Commissioners, Colonel Huecking, reported in favor of the Arnolds. The King, impressed by it, sent this report to the Supreme Court (Kammergericht), directing it to do justice. But the Court reported that there was no error.

Yet again the Arnold wife petitioned to the King. Again, the King sent it to Chancellor Fürst, for the Supreme Court. Again,

1. From *Thomas Carlyle*, "History of Frederick II of Prussia, called Frederick the Great", vol. VIII, p. 234, London, Chapman & Hall, 1898. The interpolations of Carlyle into the narrator's account have been omitted; and two changes of translation have been made, viz. "judgment" for "sentence" and "judge" for "rath".

the Court, reviewing the whole record of the two suits (exonerating Schmettau the landlord and Gersdorff the pond-maker) decided and adjudged, "Right in every particular".

It was Friday, December 10, 1779, when the King heard of this decision. He was then laid up with the gout in his Castle of Berlin; but instantly he directed that the Chancellor, with the three judges who had signed the decision, should attend him in person on Saturday, at 2 P. M.

The scene at this interview was recorded by Rannleben, one of the judges, in his autobiography—a scene probably unparalleled in judiciary history.]

At 1 o'clock I drove to the Grand-Chancellor's, where I found the Judges Freidel and Graun already arrived. The Chancellor instructed us as to what we had to do when we came before the King. And then, towards 2 o'clock, he took us in his carriage to the Palace. We entered the room immediately at the end of the Great Hall. Here we found a heyduc [hall porter], by whom the Chancellor announced to the King that we were here. Heyduc soon came back to inquire, Whether the Cabinets-Rath Stellter [a Secretary or Short-hand writer of his Majesty's] had arrived yet; and whether we were Privy Councillors. We were then shortly after shown in to the King. We passed through three rooms. . . . In the fourth, a small room with one window, was the King. The Chancellor walked first; I followed him close; behind me came the Rath Friedel, and then Graun. . . . The King sat in the middle of the room, so that he could look point-blank at us; he sat with his back to the chimney, in which there was a fire burning. . . . In his lap he had a sort of muff, with one of his hands in it, which seemed to be giving him great pain. In the other hand he held our judgment on the Arnold Case. He lay reclining in an easy-chair; at his left stood a table, with various papers on it,—and two gold snuff-boxes, richly set with brilliants, from which he kept taking snuff now and then.

Besides us, there was present in the room the Cabinets-Rath Stellter [the short-hand writer], who stood at a desk, and was getting ready for writing. The King looked at us, saying, "Come

nearer!" Whereupon we advanced another step, and were now within less than two steps of him. He addressed himself to us three judges, taking no notice at all of the Grand-Chancellor:

*King.* "Is it you who drew up the judgment in the Arnold case?"

*We* (especially I, with a bow). "Yea."

The King then turned to the judge Friedel. . . .

*King*, to Friedel. "To give judgment against a peasant from whom you have taken wagon, plough and everything that enables him to get his living and to pay his rent and taxes: is that a thing that can be done?"

*Friedel* (and the two others, bowing). "No."

*King.* "May a Miller who has no water, and consequently cannot grind, and, therefore, not earn anything, have his mill taken from him, on account of his not having paid his rent: is that just?"

*Friedel* (and the others as aforesaid). "No."

*King.* "But here now is a Nobleman, wishing to make a Fish-pond: to get more water for his Pond, he has a ditch dug, to draw into it the water from a small stream which drives a water-mill. Thereby the Miller loses his water, and cannot grind; or, at most, can only grind in the spring for the space of a fortnight, and late in the autumn, perhaps another fortnight. Yet, in spite of all this, it is pretended that the Miller shall pay his rent quite the same as at the time when he had full water for his mill. Of course he cannot pay his rent; his incomings are gone! And what does the Cüstrin Court of Justice do? It orders the mill to be sold, that the Nobleman may have his rent. . . .

*King* (to Fürst) "Go you, Sir, about your business, on the instant! Your Successor is appointed; with you I have nothing more to do. Disappear!" . . . Which order Herr von Fürst, without saying a word, hastily obeyed, passing in front of us three, with the utmost speed. . . .

*King* (continues to Friedel): "The Kammergerichts-Tribunal confirms the same judgment. That is highly unjust; and such

judgment is altogether contrary to his Majesty's landsfatherly intentions;—my name (you give it, 'In the King's Name,' forsooth) is cruelly abused!" . . . "My name to such a thing! When was I found to oppress a poor man for love of a rich one? To follow wiggeries and forms with solemn attention, careless what became of the internal fact? Act of 1566, allowing Gersdorff to make his Pond? Like enough;—and Arnold's loss of water, that is not worth the ascertaining? You know not yet what it was, some of you even say it was nothing;—care not whether it was anything. Could Arnold grind, or not as formerly? What is the Act of 1566, or any or all Acts, in comparison? Wretched mortals, had you wigs a fathom long, and Law-books on your back, and Acts of 1566 by the hundred-weight, what could it help, if the right of a poor man were left by you trampled under foot? What is the meaning of your sitting there as Judges? Dispensers of Right in God's Name and mine? I will make an example of you which shall be remembered!—Out of my sight!"

We had hardly left the room, when the King followed us, with a fulminant "Wait there!" Shortly after came an Aide-de-Camp, who took us in a carriage to the common town-prison, the Kalandshof; here two corporals and two privates were set to guard us. On the 13th December 1779, a Cabinet-Order was published to us, by which the King had appointed a Commission of Inquiry; but had, at the same time, commanded beforehand that the sentence should not be less than a year's confinement in a fortress, dismissal from office, and payment of compensation to the Arnold people for the losses they had sustained.

[The King then dictated to the shorthand writer a memorandum of this interview, ending with the following declaration, to be published in all the Berlin newspapers:]

"The King's desire always is and was, that everybody, be he high or low, rich or poor, get prompt justice; and that without regard to person or rank, no subject of his fail at any time of impartial right and protection from his Courts of Law.

"Wherefore, with respect to this most unjust judgment against the Miller Arnold of the Pommerzig Crabmill, pronounced in the

Neumark, and confirmed here in Berlin, his Majesty will establish an emphatic example; to the end that all Courts of Justice, in all the King's Provinces, may take warning thereby, and not commit the like glaring unjust acts.

"For, let them bear in mind, that the least peasant, yea, what is still more, that even a beggar, is, no less than his Majesty, a human being, and one to whom due justice must be meted out. All men being equal before the Law, if it is a prince complaining against a peasant, or vice versa, the prince is the same as the peasant before the Law; and, on such occasions, pure justice must have its course, without regard of person: Let the Law-Courts, in all the Provinces, take this for their rule.

"And whenever they do not carry out justice in a straightforward manner, without any regard of person and rank, but put aside natural fairness,—then they shall have to answer his Majesty for it. For a Court of Law doing injustice is more dangerous and pernicious than a band of thieves. Against these, one can protect oneself; but against rogues who make use of the cloak of justice to accomplish their evil passions, against such no man can guard himself. These are worse than the greatest knaves the world contains, and deserve double punishment.

"For the rest, be it also known to the various Courts of Justice, That his Majesty has appointed a new Grand-Chancellor. Yet his Majesty will not the less look sharply with his own eyes after the law-proceedings in all the provinces; and he commands you, urgently herewith: *Firstly*, To proceed to deal equally with all people seeking justice, be it prince or peasant; for, there, all must be alike. However, if his Majesty, at any time hereafter, come upon a fault committed in this regard, the guilty Courts can now imagine beforehand how they will be punished with rigour,—President as well as Judges, who shall have delivered a judgment so wicked and openly opposed to justice. Which all Colleges of Justice in all his Majesty's Provinces are particularly to take notice of.

"*Mem.* By his Majesty's special command, measures are taken that this Protocol be inserted in all the Berlin journals."

*Chapter 5*  
*ITALY*



## ITALY

## Chapter 5

26. *Benvenuto Cellini's Trial for Assault, in Florence, about A. D. 1520.  
The Famous Artist nearly meets a Premature End.*
27. *The Padua University Law Students' Guild Seeks Justice in the Local Courts, A. D. 1566.  
The Case of the Thievish Cook and the Cut-Throat; and  
The Case of the University Rector unjustly Imprisoned.*
28. *A Judgment of the Venetian Council of Ten, A. D. 1627.  
Some Daring Assassins Escape, are Tried in Absence, and Condemned to Outlawry.*
29. *Silvio Pellico, Italian Patriot, Tried for Sedition by the Austrian Government, A. D. 1820.  
A Death Sentence and a Reprieve read Together.*

26. Benvenuto Cellini's Trial for Assault, in Florence, A.D. 1520.<sup>1</sup>

*The Famous Artist nearly meets a Premature End.*

[This famous artist—goldsmith, sculptor, jeweler, medalist—had a narrow escape from a premature end to the exercise of his brilliant talents; for at the youthful age of about 20 he came in danger of suffering the extreme penalty of the law, in consequence of an act of homicidal violence. That he was a personality of ungovernable temper, is well known,—“being by nature somewhat choleric”, he himself admitted. And this trait brought him early into collision with the penal law, as he candidly relates at the outset of his autobiography.]

Having at this time worked with many different persons in Florence, I had come to know some worthy men among the goldsmiths, as, for instance, Marcone, my first master; but I also met with others, reputed honest, who did all they could to ruin me, and robbed me grossly. When I perceived this I left their company, and held them for thieves and blackguards. . . .

It chanced one day that I was leaning against a shop of one of these men, who called out to me, and began partly reproaching, partly bullying. I answered that, had they done their duty by me, I should have spoken of them what one speaks of good and worthy men; but as they had done the contrary, they ought to complain of themselves and not of me. While I was standing there and talking, one of them, named Gherardo Guasconti, their cousin, having perhaps been put up to it by them, lay in wait till a beast of burden went by. It was a load of bricks. When the load reached me, Gherardo pushed it so violently on my body that I was very much hurt. Turning suddenly round and seeing him laughing, I struck him such a blow on the temple that he fell down,

1. From *Benvenuto Cellini*, “Autobiography”, transl. J. Addington Symonds, New York, Pickwick Publishing Co., 18—, p. 26.

stunned, like one dead. Then I faced round to his cousins, and said: "That's the way to treat cowardly thieves of your sort;" and when they wanted to make a move upon me, trusting to their numbers, I, whose blood was now well up, laid hands to a little knife I had, and cried: "If one of you comes out of the shop, let the other run for the confessor, because the doctor will have nothing to do here." These words so frightened them that not one stirred to help their cousin.

As soon as I had gone, the fathers and sons ran to the Eight [the City Magistrates], and declared that I had assaulted them in their shops with sword in hand, a thing which had never yet been seen in Florence. The Magistrates had me summoned. I appeared before them; and they began to upbraid and cry out upon me—partly, I think, because they saw me in my cloak, while the others were dressed like citizens in mantle and hood; but also because my adversaries had been to the houses of those magistrates, and had talked with all of them in private, while I, inexperienced in such matters, had not spoken to any of them, trusting in the goodness of my cause. I said that, having received such outrage and insult from Gherardo, and in my fury having only given him a box on the ear, I did not think I deserved such a vehement reprimand.

I had hardly time to finish the word "box", before Prinzivalle della Stufa, who was one of the Eight, interrupted me by saying: "You gave him a blow, and not a box, on the ear." The bell was rung and we were all ordered out, when Prinzivalle spoke thus in my defence to his brother judges: "Mark, sirs, the simplicity of this poor young man, who has accused himself of having given a box on the ear, under the impression that this is of less importance than a blow; whereas a box on the ear in the New Market carries a fine of twenty-five crowns, while a blow costs little or nothing. He is a young man of admirable talents, and supports his poor family by his labour in great abundance; I would to God that our city had plenty of this sort, instead of the present dearth of them."

Among the magistrates were some Radical fellows with turned-up hoods, who had been influenced by the entreaties and the calum-

nies of my opponents, because they all belonged to the party of Fra Girolamo; and these men would have had me sent to prison and punished without too close a reckoning. But the good Prinzivalle put a stop to that. So they sentenced me to pay four measures of flour, which were to be given as alms to the nunnery of the Murate.

I was called in again; and he ordered me not to speak a word under pain of their displeasure, and to perform the sentence they had passed. Then, after giving me another sharp rebuke, they sent us to the chancellor; I muttering all the while, "It was a slap and not a blow," with which we left the Eight bursting with laughter.

The chancellor bound us over upon bail on both sides; but only I was punished by having to pay the four measures of meal. Albeit just then I felt as though I had been massacred, I sent for one of my cousins, called Maestro Annibale, the surgeon, father of Messer Libroдоро Libroдори, desiring that he should go bail for me. He refused to come, which made me so angry, that, fuming with fury and swelling like an asp, I took a desperate resolve.

At this point one may observe how the stars do not so much sway as force our conduct. When I reflected on the great obligations which this Annibale owed my family, my rage grew to such a pitch that, turning wholly to evil, and being also by nature somewhat choleric, I waited till the Magistrates had gone to dinner; and when I was alone, and observed that none of their officers were watching me, in the fire of my anger, I left the place, ran to my shop, seized a dagger and rushed to the house of my enemies, who were at home and shop together. I found them at table; and Gherardo, who had been the cause of the quarrel, flung himself upon me.

I stabbed him in the breast, piercing doublet and jerkin through and through to the shirt, without however grazing his flesh or doing him the least harm in the world. When I felt my hand go in, and heard the clothes tear, I thought that I had killed him; and seeing him fall terror-struck to earth, I cried: "Traitors, this day is the day on which I mean to murder you all!" Father, mother, and

sisters, thinking the last day had come, threw themselves upon their knees, screaming out for mercy and with all their might; but I perceiving that they offered no resistance, and that he was stretched for dead upon the ground, thought it too base a thing to touch them. I ran storming down the staircase; and when I reached the street, I found all the rest of the household, more than twelve persons; one of them had seized an iron shovel, another a thick iron pipe, one had an anvil, some of them hammers, and some cudgels. When I got among them, raging like a mad bull, I flung four or five to the earth, and fell down with them myself, continually aiming my dagger now at one and now at another. Those who remained upright plied both hands with all their force, giving it me with hammers, cudgels, and anvil; but inasmuch as God does sometimes mercifully intervene, He so ordered that neither they nor I did any harm to one another. I only lost my cap, on which my adversaries seized, though they had run away from it before, and struck at it with all their weapons. Afterwards, they searched among their dead and wounded, and saw that not a single man was injured.

I went off in the direction of Santa Maria Novella, and stumbling up against Fra Alesio Strozzi, whom by the way I did not know, I entreated this good friar for the love of God to save my life, since I had committed a great fault. He told me to have no fear; for had I done every sin in the world, I was yet in perfect safety in his little cell.

After about an hour, the Eight, in an extraordinary meeting, caused one of the most dreadful bans which ever were heard of to be published against me, announcing heavy penalties against who should harbour me or know where I was, without regard to place or to the quality of my protector. My poor afflicted father went to the Eight, threw himself upon his knees, and prayed for mercy for his unfortunate young son. Thereupon one of those Radical fellows, shaking the crest of his twisted hood, stood up and addressed my father with these insulting words: "Get up from there, and begone at once, for to-morrow we shall send your son into the country with the lances."

My poor father . . . came to visit me, together with a young man of my own age, called Pierro di Giovanni Landi—we loved one another as though we had been brothers. Under his mantle the lad carried a first-rate sword and a splendid coat of mail; and when they found me, my brave father told me what had happened, and what the Magistrates had said to him . . . . Frate Alessio disguised me like a friar and gave me a lay brother to go with me. Quitting the convent, and issuing from the city by the gate of Prato, I went along the walls as far as the Piazza di San Gallo. Then I ascended the slope of Montui, and in one of the first houses there I found a man called Il Grassuccio, own brother to Messer Benedetto da Monte Varchi. I flung off my monk's clothes, and became once more a man. Then we mounted two horses, which were waiting there for us, and went by night to Siena. Grassuccio returned to Florence, sought out my father, and gave him the news of my safe escape.

In the excess of his joy, it seemed a thousand years to my father till he should meet that member of the Eight who had insulted him; and when he came across the man, he said: "See you, Antonio, that it was God who knew what had to happen to my son, and not yourself?" To which the fellow answered: "Only let him get another time into our clutches!" And my father: "I shall spend my time in thanking God that He has rescued him from that fate."

## 27. The Padua University Law Students' Guild Seeks Justice in the Local Courts.<sup>1</sup>

[All the early Italian universities—unlike those of France—were democracies, i. e. student-governed. The students made their own regulations; and they engaged, paid and discharged their teachers. The whole student-body—several thousands, usually—was made up of guilds (called "nations"), each guild including the men from a different region,—Hungary, Rome, Piedmont, France, Ger-

1. Translated from the Latin records of the Germanic Law-Students' Guild at the University of Padua: "Atti della Nazione Germanica del Legisti nello Studio di Padova", ed. *Biagio Brugi*, vol. I, pp. 137, 190 (in "Monumenti Storici pubblicati della Reale Deputazione Veneta di Storia Patria", vol. XXI, serie prima, Documenti, vol. XV; Venice, 1912).

many, and so on. Each guild elected annually its "rector", or governor, and the entire student body elected a "rector magnificus". At Bologna and at Padua, the law-students, who were the most numerous, had their own guilds, formed also by regions. The extracts below are from the records kept by the Germanic Law-Students' Guild at Padua. These records are a candid and captivating chronicle of student-life in those days.

Now at Padua (as at Bologna and Oxford) the patronage of these large student-bodies was of great importance to the City,—both in prestige and in moneys spent. The guilds well realized this, and they had long claimed and secured a certain measure of exemption from the City's jurisdiction. More than once, to bring the city authorities to yield to their terms, they seceded, and decamped to another city for a time. Hence, a more or less constant jealousy and bickering and friction between Town and Gown; at Oxford, indeed, the story of such conflicts was a long and bitter one, covering centuries. At Padua, this under-current of feeling runs all through these guild-records, and explains some of the sentiments expressed in the two cases here quoted.

But at Padua the guilds had another remedy than secession, for securing their rights and privileges,—an appeal to the government of Venice. The Paduan principality had long been under Venetian rule, at the time of these records, and the City was only a short 25 miles distant from Venice. Its mayor or prefect, who was at the head of the City judiciary, was appointed from Venice. Hence the proceedings illustrated in the first case here narrated.]

1. *The Case of the University Governor unjustly Imprisoned.* (Recorder, Councillor Charles Frolich of Frolichsburg in the Tyrol).

April, 1566: The Governorship of the University was this year exercised, with the highest approval and satisfaction of the entire city, by Frederic Balthasar of Ossa in Saxony. It happened that on the last day of April he had gone out after dinner for a pleasurable stroll through the town, as usual, accompanied by a few of his servitors, and had got as far as the bridge of San Lorenzo, about nine in the evening, when, as he was proceeding straight home-

wards, a great crowd of the city bailiffs, carrying spears and cross-bows and blunderbusses and other weapons, deliberately obstructed his passage. And although he was doing no more than bearing himself like a gentleman, nor was he infringing any usages of the city but was quietly going on his way, these outrageous brutes, out of sheer desire to offend and injure him, and forgetting all respect for his office and every other consideration, bore down on him with insolent and furious clamor, shouting "Maza, Maza". As this appeared to him to be an ambush directed at taking his life, he fearlessly directed his own people to resist the assault, and though inferior in number to the assailants, they fought vigorously and defended themselves with all their might.

Nevertheless, after a prolonged contest the Governor was overcome and his sword wrested from him, and he was made captive, together with his deputy who lived with him and three of his servitors, and taken to the Prefect of the city. The Prefect did indeed direct that the Governor be immediately released; but, as the Governor was unwilling that his people should be forcibly taken and subjected to the public disgrace of arrest, he refused to be the only one released. The Governor therefore was confined in a small room, and his deputy and the servants were cast into the filthy jail.

Next day, when this became known, all the University Councillors, and the rest of the students, met early at the University to plan for the liberation of the Governor. By unanimous vote we all went in haste to the Prefect, complaining of the insult done to the Governor by the bailiffs, and asking for his release. But the Prefect, irked by the presence of this mass of students, obstinately refused to be moved by either prayers or menaces. So we returned to the University and discussed what to do.

Various proposals were made. But all agreed that the insult was intolerable, and that the matter should be taken up with the Senate of Venice. So, in the result, I was chosen, with three others, to go to Venice.

Which we did, and told the whole story at a meeting of the illustrious Doge and the entire Senate, making as strong a case as we

could of this violation of the privileges of our University. They unanimously deemed our demand to be just, informed us of their decision, and delivered to us a written order for the release of the Governor and his people.

We joyfully returned to Padua, and showed the order to the Prefect. He, however, wishing to keep us in suspense, answered that he would first make a report of his own to the Senate.

So, in view of his obstinacy and his insistence on detaining our Governor, the Germanic students, after further consultation, sent a delegation of students of the highest rank and attainments (to wit, Littichius Pockhof of Pomerania, John Frohlich my brother, Theodore Peisser, John of Hobockhen, Lawrence Zimmerman, George Khlain) to a certain illustrious and honored Professor from Turn, who was at that time in Venice as advocate, etc., of his Majesty the Holy Roman Emperor, [requesting him to speak for us].

Who not only in words offered us every aid and counsel and effort, but very soon presented our case and made good his words. For with such zeal and pertinacity did he present the matter to the Doge and the Senate that an order issued, not only for the release of the Governor and his people, but also for the Paduan captain of the bailiffs to punish their insolence.

It is well-known that no governor ever spent money so lavishly here at Padua as did our Frederic of Ossa. For in the period of his office he spent more than ten thousand crowns, and so in the end he got this much glory in consolation for his imprisonment.

2. *The Case of the Thievish Cook and the Cut-Throat.* (Recorder, Councillor John of Seidlitz, A. D. 1575).

The Germanic students live in a building hired for their own exclusive use, no one else living there but an old woman who prepared the food. One evening, between meals, somebody stole a quantity of money and a gold chain, value 200 crowns in all. The victims of the theft went next morning to the criminal court and complained, telling the circumstances that pointed to the old cook as the thief.

The official approved and accepted their testimony as showing probable cause, and issued process against the old woman, put her in jail, and in view of some additional evidence subjected her to the torture. For it appeared that the greedy wretch not only had a certain cut-throat as a secret lover, but also that she had allured him to her love by bestowing money on him, though she had none of her own which she could have spent for that or any other purpose. So the judge, for getting at the truth, directed that the cut-throat also be arrested and put in jail.

However, though the old woman was several times put to the torture, yet nothing was confessed; which often happens when the cords are twisted on such old hags. For these callous minions of the Devil possess the most perfect palliatives for enduring any extremity of the torture; of which Damhouder's treatise on Criminal Practice gives some remarkable examples.

Hence, since nothing could be extracted from her, she was discharged as innocent, together with her accomplice the cut-throat.<sup>2</sup>

So our excellent young fellows were not only obliged to submit to the loss of their property, but also felt themselves made a laughing-stock by the lawyers. For, though these had been hired at no small cost, the rumor was that they had been in collusion with the culprits. Furthermore, the young men were now in danger of their life; for the cut-throat when set free, asserting that he had been grievously wronged, threatened to kill his accusers; but as almost all of the latter, with the others interested, had then left the court, they were able to avoid any ambush.

I took note of this danger, so that our fellows might be warned to keep strict watch over their property, and to be very careful with whom they kept company; for there would be no recovery for any losses.

About this same time, the sum of 50 crowns in money was stolen from my very good friend Gallus. The theft was made by the wife of his own landlord, with whom Gallus had left the key of his

2. Pursuant to the Continental law of the times, which required a confession, for confirming circumstantial evidence, before the accused could be found guilty.

room and the custody of his things when he went up to Venice. On his return, finding his room door locked and uninjured, and his money gone, naturally there was nobody else to charge with the theft except the woman who could have unlocked the door.

The woman's husband appeared in court, not for defending the woman but to frighten off her accuser; for he alleged that the student who accused his wife was a heretic, whose good will would drive away luck and happiness from any home; which was now the case with his home, where no person had been guilty of the offence charged.

The unfortunate Gallus, realizing that his further pursuit of the complaint would not only be futile but would be the worse for him, then withdrew his complaint; deeming that his loss was irrecoverable and that he would be happiest to forget it completely.

Whence it appears that in this confounded town the action to recover stolen property<sup>3</sup> is a perilous proceeding for the plaintiff.

## 28. A Judgment of the Venetian Council of Ten, A.D. 1627.<sup>1</sup>

*Some Daring Assassins Escape, are Tried in Absence, and Condemned to Outlawry.*

[The Government of the Venetian domain by the 1100s had become a sheer aristocracy, and gradually then an oligarchy within

3. *Condictio furti*,—a sarcastic reference to the Roman law of procedure which the student-recorder had doubtless just been studying.

1. The judgments of the Council of Ten were officially printed, not in book form periodically, but (like the old Chinese Official Gazette and like some of the early American Colonial laws) each one in a separate leaflet, with date. These were distributed to all officials concerned, after being publicly read in the Piazza of San Marco and at the Rialto Market-place.

But private individuals might make a collection (more or less incomplete) of these leaflets and bind them in volumes. Such a collection, obtained at Florence in 1923, is now in the possession of the Gary Law Library of Northwestern University. Volume One bears a special title-page, inscribed within an ornamental scroll as follows: "Bandi Veneti per la Biblioteca di Mons. Illmo Rmo Gasparo Negri, Vescovo di Parenzo, Tomo I." The pages of the successive leaflets are serially numbered by hand. The two documents here translated from the old-fashioned Italian are found at pp. 93 and 120 A.

the aristocracy. By the 1300s the Council of Ten, at first a committee with limited powers, was slowly aggregating to itself the major share of all powers, particularly the criminal judiciary and the police.

This Council nominally had 17 members,—the Doge (who gradually became a grandiose figurehead), his six personal Councillors, and the Ten; but the Ten were the real power-holders.

In all literature, alike of history and of fiction, the name of the Council of Ten came to bear a sinister repute. The following description is from an authoritative historian of a century ago:<sup>2</sup> "The Council of Ten became the standing tyranny of Venice. . . . The public eye never penetrated the mystery of their proceedings. The accused was sometimes not heard, never confronted with witnesses. The condemnation was as secret as the inquiry, the punishment undivulged like both. The terrible odious machinery of a police, the insidious spy, the stipendiary informer, unknown to the carelessness of feudal governments, found their natural soil in the Republic of Venice. . . . Their spies and emissaries pervaded every quarter of the city; they seized, imprisoned, or put to secret death, without responsibility to any higher authority; whilst no rank was secure from their machinations".

The high powers of the Council of Ten continued throughout the 1600s, the period from which the judgment here quoted is taken. A perusal of these two documents indicates that there has been some exaggeration as to the fearful secrecy and unfair procedure of the Council of Ten; for these documents are merely typical of the entire collection of originals quoted from. Like the English Star Chamber, the Council of Ten may well have received a black name from the biased accounts of its opponents because of its very efficiency in repressing the disorders and factional conspiracies of a turbulent political era.

These two documents deal with a daring attack of assassins on one of the members of the Council itself, as he left the meeting.

2. From *Henry Hallam*, "The State of Europe during the Middle Ages", as quoted in "The Historians' History of the World", ed. Henry Smith Williams, New York, 1907; vol. IX, Italy, chap. IX, p. 272.

The first document, dated December 31, proclaims the measures taken to secure proof of the offenders' identity. These measures must have been highly effective; for the second document is dated only seven days later, January 7, and proclaims the judgment rendered, after due summons and trial 'in absentia' of the assassins; who had in the meantime promptly fled beyond the boundaries of Venice.<sup>3</sup>

The thorough methods of the Council in offering rewards to informers and in pronouncing attainder upon the culprits, are in their details peculiar to Venice; but in principle they are not different from the methods of the time prevalent in other countries.]

1. *Resolution adopted by the Most High Council of Ten on 31 December 1627, against those who committed the atrocious assault on the person of the Noble Lord & Cavalier Rhanier Zen.* Let no single thing be omitted that is within the power of this Council to ascertain the identity of the principals and their accomplices who so audaciously and detestably and wickedly, at the river portals of the Palace, assaulted and inflicted nine mortal wounds on our noble and beloved cavalier Rhanier Zen, when he on departing from our Council meeting was in the act of entering his gondola. For considering the exalted position of the victim, assaulted almost in the very presence of the Council, and considering the place, the hour, and the other deplorable circumstances, there is no person who will not be keenly anxious to avenge with exemplary punishment a crime of such nature, in the interest of Justice and the honor of the Republic,—an offence which requires to be investigated not only by the ordinary means but by every conceivable means, for the preservation of the liberty and safety of all, and particularly of the Magistrates, the Councillors, and their assistants. Therefore,

Be it decreed that, in the usual manner of choosing the State Inquisitors, there be chosen three Inquisitors to be charged specially

3. Though the year-date of both of these documents is 1627. It will be remembered at that period the calendar year-number began with the month of March; so that both December and the next January dated in 1627.

with the duty of investigating diligently all the details of the said assault exercising the authority of the Criminal Bench. And let it be immediately proclaimed on the Stairs of San Marco and at the Rialto that

Whoever within the next three days, whether principals in any degree, will give information to the secret police or otherwise, of the persons guilty of the said atrocious crimes, so that by means of such information the identity of the culprits be ascertained, shall not only be held in absolute secrecy, but his name shall not at any time be made known, not even at the trial; and such informant may be assured, after the facts have been established and his information verified, that he will be given a password, upon using which password he can forever hereafter identify himself to the said three Inquisitors and may thus enjoy the following benefits, to wit: Immunity for his own part in the offence, whether as principal or accessory, and furthermore the sum of ten thousand ducats to be immediately paid to him from the Treasury of the Council (which sum shall be repaid thereto from the goods of the culprits); and furthermore the privilege of setting free any outlaw, exile, or prisoner whomsoever, whether condemned by the present or any prior Council, and despite any condition or exception whatsoever that may have been attached to such sentence; the foregoing to apply to principals in any degree, whether the doers or their hirer or hirers.

And as to accomplices or accessories before or after the fact, the informer, for every such accessory who is captured, condemned, and punished with death, will receive three thousand ducats, and the like privilege to set free a life-prisoner or one exiled for any offence, or one outlawed for life, notwithstanding his non-fulfilment of any conditions attached to his sentence, excepting only a person outlawed for reasons of State.

And all persons who may have even the least information as to any of the culprits shall be bound to disclose that information within the said three-day period, by such means as they may deem best, and in case of not so doing shall be in danger of outlawry

or exile or galleys or even of death, according to their status, for their concealment of the truth is both an inexcusable offence and breach of duty and a disloyalty to the Prince, who for the reasons above stated deems that such conduct is treasonable, and that the doers and their accomplices, as well as those who conceal the truth deserve to be known as Public Enemies ("Hostes Patriae"). And those persons who may give information against such concealers of the truth shall have their names kept secret as above, and shall receive, for each person who by reason of their information is punished, the like privilege of setting free any outlaw, exile, or prisoner as above, provided the conditions attached to his sentence are fulfilled.

And the gondoliers or servants or any other persons who have operated or loaned gondolas to any of the said culprits, if they do not within the space of twenty-four hours come and give information as to what they have done, known, or heard, shall be in danger if caught of being hung by the neck until they die, and if they absent themselves shall be declared outlaws forever, subject to death, in all the lands and places of our Domain. And whoever shall have knowledge of such gondoliers or others who have rowed or otherwise aided as above and shall disclose such knowledge, shall receive one thousand lire of the said moneys for each person so convicted and punished, and shall further have the privilege of setting free any exile or prisoner or person outlawed by this Council who has fulfilled all conditions, and if on the other hand, having such knowledge he fails to disclose it, he shall be liable to the penalties above stated.

And if any persons so giving information shall themselves be outlaws or evaders of justice, they shall receive immunity and be freed from penalties, in addition to the benefits above specified, notwithstanding any general or special regulation to the contrary, which is for the present case suspended by order of the Council.

And let the present resolution be printed for the knowledge of all persons, and be sent to all officials of our City on the mainland, with directions to publish it in the customary places in the said City

and in every district or place under their jurisdiction. And should any officials within three days after such publication receive such information, they are to forward such information immediately to the three Inquisitors aforesaid.

Day 31 December 1627

Proclaimed on the Stairs of San Marco and on the Rialto.

2. *Judgment of the Most High Council of Ten of Venice against Zorzi Corner and others.*

1627 7 January. In the Council of Ten.

Whereas Zorzi Corner, having been summoned to appear by his Serene Highness the Prince, and having remained absent, inasmuch as he, bearing deadly malice against the Noble Cavalier Rhanier Zen, for reasons most unjust and wicked, which duly appear of record, and having planned by any means whatever to deprive him of life, had with malice aforethought arranged to effect his diabolical and accursed purpose, and had gathered arms and a company of wicked assassins, to ensure the success of his design,

And whereas in pursuance thereof, on the evening of the 30th of December last, at the little river-bank before the Prince's palace, some of the said cruel and wicked assassins, chosen by him for this most wicked deed, were caused to be gathered in ambush at the very Palace of the Doge, awaiting there the departure of the said Cavalier Zen from the meeting of the Council which he was attending, and when he had arrived at the Stairs about five o'clock of the evening of the said 30th of December, expecting no harm and deeming himself safe, they, coming to the place where he was to pass out and where he then was, entering through the portal of the Courtyard of the Palace, near to the Giants' Stairs, that is to say, in the very heart of the Republic, which by its sacred laws should be especially respected and deemed safe for all, thereupon the said Zorzi not having the fear of our Lord nor respect for Justice nor for the heinous nature of the offence which he was committing against his Country, then assaulted and most inhumanly



and barbarously and so wounded him with guns and pistols to deprive him of life, the said villains so maltreating him that they thought him dead,

And whereas, having departed and escaped through the portal of the Palace to the river-bank, and having closed the portal so as to prevent pursuit by the officers or others who were running up in alarm at this horrible crime, they went off to the Cavana landing-place, where the said Zorzi had held a gondola in waiting for this purpose, in which gondola he with four of the said villains got away from the City, rowed by Olivo, steersman of the gondola and by Zuane of the Menego Tavan ward, a hired employee and nephew of the said Olivo, as his gondoliers, and by a third person as yet unknown to Justice and with the said gondoliers they escaped up the river Po into a neighboring State,

Therefore, be it known that the said Zorzi Corner is deprived of his rank as a noble, together with all his descendants forever, and his name is cancelled from the Golden Book, and he is banished forever from the City of Venice and the Duchy and all other towns, estates, and places in our Domain, both terrestrial and marine, and vessels whether armed or unarmed,

And that, if captured, he shall be brought into this City and at the accustomed hour, between the two columns of Saint Mark, on a high scaffold he shall be cut at the head so that it be separated from the trunk and that he die.

And to whoever shall capture or slay him within our borders, on making due proof of the slaying, shall be given for reward the sum of six thousand ducats, or if in territory without the Duchy the sum of ten thousand ducats, to be paid in cash immediately from the Treasury of this Council to the captor or the slayer or to his attorney or agent or other representative, without any denial and despite any delay or other thing to the contrary; the captor or the slayer or his agent being entitled also, at his pleasure and without any objection, to claim the said reward in any sort of money, notwithstanding any contrary reason by our Treasury of State, wherever the said person may best please and be entirely satisfied.

And besides the aforesaid reward he shall have the privilege to set free an outlaw or exile or prisoner guilty of any offence whatsoever, and whether condemned by this Council or by any delegated authority thereof, and notwithstanding any conditions that may have been imposed as to time or number of votes or terms of the judgment or other conceivable ground whatsoever, even for reasons of State.

And furthermore he who shall deliver the party alive into the hands of Justice shall, besides the above reward and privilege, have the privilege of setting free another outlaw or exile or prisoner for whatsoever cause as above, even though conditions have not been fulfilled, excepting only a matter of State.

And if it happens that in the course of such capture or slaying the captor or the slayer meet his death his lawful heirs shall have all the above privileges and awards without any diminution; these benefits to be allowed in any case upon vote of only one half the number of the Council, notwithstanding any general or particular regulation to the contrary in respect to outlaws or other persons, which has been or at any time could have been made, and as if the same had expired; the present being in complete derogation of any such regulation.

But no privilege herein granted can be taken advantage of to set free any person herein outlawed, whether by giving information or otherwise, even on matters of State. Nor can any such outlaw by himself capturing or killing a fellow-outlaw, whether of equal or higher rank than himself, or in any number or at any time, be freed from the present outlawry. Nor may he receive any favor, by way of suspension, lessening, or remission of the penalty, or other change in the present judgment, regardless of the number of votes, or any dispensation from the required number of seventeen votes as set forth below, whether by way of re-hearing, or in the form of safe-conduct, or by reason of having fought in the service of the Republic, or by pardon of the Doge, or for any other reason whatever either public or private, and not even in time of war by any commander on land or on sea having any authority, nor by any elected magistrate having authority to free outlaws; *Unless*

*as follows*, viz. by Resolution adopted by all six Councillors and the three chiefs of Council with all nine votes of the said Councillors and Chiefs, and then by all members of the Council sitting in the full number of seventeen, and provided in every case the entire record of the trial be first read aloud to the said Council, which said record shall not in any event or time be withdrawn from the Treasury nor be passed upon nor discussed as to its reading except by resolution adopted as above, and the present judgment with all its recitals being first read; under penalty of one thousand ducats for whoever shall make proposal to the contrary, not only for the withdrawal of the record from the Treasury but also for the omission of any of the above requirements; which fine shall be exacted by bounden oath of each of the Councillors, Chiefs, and Magisterial Advocates of the City.

And nevertheless any resolution which may be passed contrary to the terms of the present one shall be null and void.

And the said Zorzi Corner is hereby subjected to all the penalties of outlawry and other provisions contained in the present judgment, so that he may be captured or slain with impunity and with all the privileges and rewards heretofore specified in this judgment, which shall be forever unaltered and inviolable.

And all of his possessions, movable and immovable, present and future, which in any manner appertain to him now or in any other time may appertain or come to him, even the shares legally due to be inherited by him, do now remain confiscated and shall be taken possession by the Magisterial Advocates of our Commonwealth, and applied to the Treasury of this Council, and any entailed property which may in any manner or at any time appertain or come to him during his life shall likewise be confiscated.

And those immovable properties which, as his legal share or otherwise as above, may now appertain to him shall be sold and the proceeds thereof be placed in the Treasury of the said Council, on condition that the sales be approved by a two-thirds vote of the said Council. And if, by reason of a fair price not being obtained, such sales be not approved by the said Council, they shall if build-

ings be torn down and the proceeds of the sold materials be deposited in the Treasury of the said Council, and if cultivated lands shall be turned into pasture and given to the use of the neighboring towns.

And from the present members of the Council shall be chosen three Inquisitors, whose duty it shall be to inquire into and ascertain fully, by means of the secret police, the extent of the properties which may in any way appertain to him. And let it be known by all that any person, of whatever rank or condition he be, who holds goods, moneys, gold or silver objects, or jewels, or who knows of any credits or other claims of any sort or amount whatsoever, belonging to the said outlaw, shall within the period of eight days next following the present proclamation, give full and complete information thereof to the said Inquisitors, otherwise shall incur the penalty of paying double the amount and of being exiled from this city of Venice and its suburbs and from all other cities, estates, and places between Menzo and Quarner for the period of twenty consecutive years; and for information so given he shall receive a reward of six hundred lire to be paid from the goods of such outlaw, if available, otherwise from moneys in the Treasury of the said Council set aside for paying rewards. And any one found disobeying a said decree of exile shall be confined in prison for five successive years and then be returned to his exile, which shall re-commence from that date, and a like reward shall be given to all who inform on such violations, whose names shall be kept absolutely secret.

And it is further declared that all contracts shall be deemed void which the said Zorzi Corner may have made for a month past; every one being bound to disclose it within the period of eight days next following, and whatever such property is eloiigned shall be confiscated, like all his other property as above; but expressly providing that whatever may be eloiigned of such goods but later fall into the hands of the Treasury of the said Council, shall be retained by it for reimbursing payment of the above rewards, which said rewards nevertheless shall in any event be paid with the utmost promptness and in any desired moneys as above set forth.

And if any person, whether noble, burgher of our Domain, or other person having property within our State, of whatsoever rank or condition, without exception, and whether related to him in any degree, shall ever at any time, either in this City or in any part whatsoever of our State or without it, give to him any favor or guidance or money or employment or receive him into his home, or accompany him on the road, or write to him, or give him information, or aid him in any way whatsoever, or shall have any dealing or understanding with him, even a mere conversation, shall incur the penalty, whether noble or burgher, of confiscation of all his property of whatever sort, and if he is confined as a convict in the galleys, of being put for ten years in one of the new prisons of the Chiefs of this Council shut off from the light, and if not so confined, of being exiled forever from this city of Venice and the Duchy and of our entire State, both land and sea and vessels whether armed or not armed, under penalty as above of evading this exile. And if the culprit is neither noble nor burgher, he shall, besides confiscation of property, be sent to serve as galley-oarsman chained by the feet, subject to the regulations of the War Department, in a convict-galley, for ten consecutive years, and if not capable of such service, then to remain for the same period in a dungeon-prison as above.

And whoever shall make accusation to the authorities of justice, or to the secret police, or without signature to the Chief Councilors who are charged as Inquisitors in this case, shall have his identity kept absolutely secret; and upon conviction and punishment of the offender so accused shall receive one-third of the property confiscated by means of his information, and shall also receive a reward of five hundred ducats, to be paid to him without delay other than as may be necessary to prove that he was such accuser.

And if, whether within or without this City, there be found any statute, bust, or other public monument to the said Zorzi Corner, it shall be wholly removed, and for this purpose the Chiefs of this Council shall give all orders necessary for the purpose. And in the exact spot where this crime was committed there shall be set up a marble placard, to remain during the lifetime of the said Zorzi

Corner, on which shall be inscribed the rewards and privileges to be obtained by any who slay him or bring him alive, as set forth above; this measure to be executed immediately by the Chiefs of the Council.

Let the present judgment of the Great Council be publicly read on the Stairs of San Marco and the Rialto, and on the first Sunday of Lent during the outlaw's life, and by the Magisterial Advocate of the Commonwealth in the Great Council; and let it be printed and distributed to all of our mayors and deputies on land and on sea and to our naval captains, to the end that it be made known to every person; and also to our Ambassadors and Secretaries and our Residents at the courts of all Princes, and to our Consuls, to the end that it be known in every region.

29. *Silvio Pellico, Italian Patriot, tried for Sedition by the Austrian Government, A.D. 1820.*<sup>1</sup>

*A Death Sentence and a Reprieve read Together.*

[In the international re-arrangements of territory after the downfall of Napoleon in 1815, the northeastern regions of Italy were placed under the domination of Austria. The governmental spirit of the times was reactionary, and all liberal revolutionary aspirations were harshly repressed. The young liberals of Italy, nevertheless, proceeded persistently with their attempts. A secret society, known as the Carbonari, was a chief organ for these efforts to achieve Italian unity and self-government.

Silvio Pellico, a young Italian of good family, was arrested, tried, and condemned as one of the conspirators. His story of his ten-years' experiences in one prison dungeon after another became a classic of Italian literature. Here are given the passages telling of his trial and condemnation.]

On Friday, October 13, 1820, I was arrested at Milan, and conveyed to the prison of Santa Margherita. The hour was three in

1. From *Silvio Pellico*, "My Prisons" (I Miei Prigioni), translated in "The Literature of Italy, 1265-1907", ed. *Rossiter Johnson* and *Dora Knowlton Ranous*; New York (?), 1906, The National Alumni.

the afternoon. I underwent a long examination, which occupied the whole of that and several subsequent days; but of this I shall say nothing.

[After transfer to another prison,] here I was recalled, to be examined anew. The process continued through the day, and was again and again repeated, allowing me only a brief interval during dinner. While this lasted, the time seemed to pass rapidly; the excitement produced by the endless series of questions put to me, and by going over them at dinner and at night, digesting all that had been asked and replied to, and reflecting on what was likely to come, kept me in a state of incessant activity.

At the end of the first week I had to endure a most vexatious affair. My poor friend Piero, eager as I to have some communication, sent me a note, not by one of the jailers, but by an unfortunate prisoner that assisted them. He was from sixty to seventy, and condemned to I know not how long a period of captivity. With a pin I had by me, I pricked my finger, and scrawled with my blood a few lines in reply, which I committed to the same messenger. Unluckily, he was suspected, was caught with the note upon him, and from the horrible cries that were soon heard I conjectured that he was severely bastinadoed. At all events, I never saw him more.

On my next examination I was greatly irritated to see my note presented to me (luckily containing nothing but a simple salutation), traced in my blood. I was asked how I had contrived to draw the blood; was next deprived of my pin; and a great laugh was raised at the idea and the detection of the attempt. . . . Vainly did I inquire of the jailers respecting his fate. They shook their heads, observing: "He has paid dearly for it; he will never do such-like things again: he has a little more rest now."

[Being once more removed, and on the road,] when we had gone about a mile, I addressed myself to Count Bolza:

"I presume we are on the road to Verona."

"Yes," was the reply; "we are destined for Venice, where it is my duty to hand you over to a special commission there appointed."

We traveled post, stopped nowhere, and on February 20th arrived at my destination . . . . I was then conducted to the palace of the Doge, where the tribunals are now held. . . . We ascended to the palace: Count Bolza spoke to the judges; then handing me over to the jailer, after embracing me with much emotion, he bade me farewell.

I followed the jailer in silence. After turning through several passages and large rooms, we arrived at a small staircase, which brought us under the Piombi [leads]—those notorious state prisons that date from the time of the Venetian Republic.

There the jailer first registered my name, and then locked me up in the room appointed for me. The chambers called I Piombi consist of the upper portion of the Doge's palace, and are covered throughout with lead.

My room had a large window with enormous bars, and commanded a view of the roof (also of lead) and the church of St. Mark. . . . For several days the anxiety I suffered from the criminal trial appointed by the special commission made me rather melancholy; and it was increased, doubtless, by that painful feeling of deeper solitude.

Moreover, I was farther removed from my family, of whom I heard no more. The new faces that appeared wore a gloom at once strange and appalling. Report had greatly exaggerated the struggle of the Milanese and the rest of Italy to recover their independence. It was doubted whether I were not one of the most desperate promoters of that mad enterprise. . . .

The month of October returned [1821], one of the most disagreeable anniversaries in my life. I was arrested on the 13th of that month in the preceding year. . . . My only consideration now was to die like a Christian with proper fortitude. . . . I felt, indeed, a strong temptation to avoid the scaffold by committing suicide, but overcame it. . . . The probable approach of death so riveted my imagination upon this idea that not only did it seem possible but it was marked by an infallible presentiment. I no longer indulged a hope of avoiding it;

and at every sound of footsteps and of keys, or at the opening of my door, I was in the habit of exclaiming, "Courage! perhaps I am going to receive sentence. Let me hear it with calm dignity and bless the Lord." . . .

On January 11, 1822, about nine in the morning, Tremello came into my room in no little agitation, and said:

"Do you know, sir, that in the island of San Michele, a little way from Venice, there is a prison containing more than a hundred Carbonari?" . . . And he went away in great emotion, casting upon me a look of compassion.

Shortly afterward the jailer came, attended by the assistants and by a man whom I never had seen. The latter opened his subject as follows: "The commission, sir, has given orders that you should go with me."

"Let us go, then," I replied. "May I ask who you are?"

"I am jailer of the San Michele prison, where I am going to take you." . . .

I reached San Michele and was locked up in a room that embraced a view of the court-yard, the lake, and the beautiful island of Murano. . . . The day following, February 21, 1822, the jailer came for me about ten o'clock, and conducted me into the Hall of the Commission. The president, the inquisitor, and two assisting judges were seated; but they rose. The first, with a look of deep commiseration, informed me that my sentence had arrived; that it was terrible, but that the clemency of the Emperor had mitigated its severity.

The inquisitor, fixing his eye on me, read it: "Silvio Pellico, condemned to death. The imperial decree is, that the sentence be commuted to fifteen years' close confinement in the fortress of Spielberg."

"The will of God be done!" was my reply.

It was my firm intention to bear this terrible blow like a Christian, and neither to exhibit nor to feel resentment against anyone. The president commended my state of mind, warmly recommending me

to persevere in it, and telling me that possibly I might in a year or two be deemed worthy of receiving further favors from the imperial clemency. But instead of one or two years, it was many years before the full sentence was remitted.

The other judges also spoke encouragingly to me. But one of them, who had appeared hostile on my trial, accosted me in a courteous but ironical tone, while his look of insulting triumph seemed to belie his words. I would not swear that it was so; but then my blood was boiling, and I was trying to smother my passion. While they were praising me for my Christian patience, I had not a jot of it left.

"To-morrow," continued the inquisitor, "I am sorry to say, you must appear and receive your sentence in public. It is a formality that cannot be dispensed with."

"Be it so!" I replied. . . .

At nine in the morning, Maroncelli and I were conducted into a gondola, which conveyed us to the city. We alighted at the palace of the Doge, and proceeded to the prison. We were placed in the apartment that had been occupied a few days before, by Signor Caporali, with whose fate we were not acquainted. Nine or ten bailiffs were placed over us as a guard; and, walking about, we awaited the moment of being brought into the square. There was considerable delay. The inquisitor did not make his appearance till noon, and then he informed us that it was time to go. The physician also presented himself, and advised us to take a small glass of mint-water; which we accepted, on account of the extreme sympathy that the good old man expressed for us. It was Dr. Dosmo. The head bailiff then advanced, and put the handcuffs on us, and we followed him, accompanied by the other jailers.

We descended the magnificent Giants' Stairs, and called to mind the Old Doge, Marino Faliero, who was beheaded there. We entered the great gateway, which opens upon the small square from the court-yard of the palace, and then turned to the left, in the direction of the lake. In the centre of the Piazzetta was raised the

scaffold that we were to ascend. From the Giants' Stairs, extending to the scaffold, were two lines of Austrian soldiers, through which we passed.

After ascending the scaffold, we looked around us, and saw an immense assembly of persons, apparently filled with terror. In other directions were seen bands of armed men, to awe the multitude; and we were told that cannon were loaded in readiness to be discharged at a moment's notice. . . . The German captain called out to us to turn toward the palace and look up. We did so, and beheld upon the lodge a messenger of the council, with a letter in his hand. This contained the sentence; he read it in a loud voice. There was a solemn silence, until he came to the words, "Condemned to death," and then was heard a general murmur of compassion.

This was followed by a similar silence, in order to hear the rest of the document. A fresh murmur arose at the words, "Condemned to close confinement, Maroncelli for twenty years, and Pellico for fifteen."

The captain made a sign for us to descend. We cast one glance around us, and came down. We reëntered the court-yard, mounted the great staircase, and were conducted into the room from which we had been taken. The manacles were removed, and we were carried back to San Michele.

The prisoners that had been condemned before us had already set out for Laybach and Spielberg, and were accompanied by a commissary of police. He was now expected back, in order to conduct us to our destination; but a month elapsed before he came.

It was August 1, 1830. Ten years had elapsed since I was deprived of my liberty; and for eight years and a half I had been subjected to close confinement. . . .

[After going to mass,] About a quarter of an hour afterward we partook of dinner. We were preparing our table, and had taken up our wooden spoons, when Signor Wagrath, the subintendant, entered.

"I am sorry to disturb you at dinner," said he; "but have the goodness to follow me; the director of police is waiting for us."

He [the director] took up a letter, and said, in a hesitating, slow tone of voice, as if afraid of surprising us too greatly:

"Gentlemen—I have—the pleasure—the honor, I mean—of—of acquainting you, that his Majesty the Emperor has granted you a further favor."

Still he hesitated to inform us what this favor was; and we conjectured it must be some slight alleviation of punishment, such as exemption from irksome labor, or a permission to have more books, or perhaps less disagreeable diet.

"Don't you understand?" he inquired.

"No, sir," was our reply; "have the goodness, if permitted, to explain yourself more fully."

"Then hear it! It is liberty for both of you, and for a third who will shortly bear you company!"

*Chapter 6*  
*RUSSIA*

## RUSSIA

30. A Criminal Trial in the Days of Ivan the Terrible.<sup>1</sup>*Accuser and Accused are put to the Judicial Duel.*

[The narrator is an Austrian envoy, a famous cosmopolitan traveler; he writes about the middle of the 1500's:]

Whoever wishes to lay an accusation against another for theft, plunder, or manslaughter, goes to Moscow and asks that such an one be summoned to justice. A process-server is given to him, and he appoints a day, which he announces to the man against whom the accusation is laid, and on that day he brings him to Moscow. Afterwards, when the guilty man is brought to judgment, he often denies the crime which is laid to his charge. The testimony of one nobleman is worth more than that of a multitude of low condition. Attorneys are very seldom allowed: every one explains his own case. If the prosecutor produces witnesses, then both parties are asked whether they will stand to their words. The common reply to that is, "Let the witnesses be heard according to justice and custom." If they bear witness against the guilty man, he immediately objects, makes exceptions against themselves and their testimony, saying: "I demand an oath to be administered to me, and I commit myself to the justice of God, and desire a fair field and a duel."

And thus, according to the custom of the country, a duel is adjudged to them. Either of them may appoint any other person to take his place in the duel, and each may supply himself with what arms he pleases, except a gun or a bow. But they generally have oblong coats of mail, sometimes double, a breastplate, bracelets, a helmet, a lance, a hatchet, and a peculiar weapon in the hand, like a dagger sharpened at each end, which they use so rapidly with either hand as never to allow it to impede them in any encounter, nor

1. From Baron Sigismund von Herberstein, "Rerum Moscovitarum Commentarii", Hakluyt Society Publications, 1st series, vol. X, p. 103, London, 1851.

## Chapter 6

30. *A Criminal Trial in the Days of Ivan the Terrible.  
Accuser and Accused are put to the Judicial Duel.*
31. *A Civil Trial by Lot before the Tsar, A.D. 1560.  
The English Merchant wins the Lot.*
32. *Peter the Great's Trial and Condemnation of Alexius.  
The Tsar presides at the Torture of his Own Son.*



to fall from the hand; it is generally used in an engagement on foot. They commence fighting with the lance, and afterwards use other arms. . . . Each side has many friends, abettors, and spectators of the contest, who are quite unarmed, except with sticks, which they sometimes use. For if any unfairness seem to be practised upon either of them, the friends of that one immediately rush to avenge his injury, and then the friends of the other interfere, and thus a battle arises between both sides; which is very amusing to the spectators, for the hair of their heads, fists, clubs, and sticks burnt at the points, are all brought into play on the occasion.

### 31. A Civil Trial by Lot before the Tsar, A.D. 1560.<sup>1</sup>

#### *The English Merchant wins the Lot.*

[Even before the Tsar himself, the primitive methods of the lot and the duel still obtained in the 1500s, as we learn from the experience of an English merchant who sought the Tsar's justice to decide a money dispute with some Russian merchants:]

Sundrie Russian merchants . . . were then driven to credite us and compound in value untill the next returne. At which time, notwithstanding good accompt in the value of 600 robles, there grewe question by their double demand. So in April Anno 1560, before my comming from Moscovia, they obtained trial by combat or letter to have their summe double, or as I proffered 600 robles. For combatte I was provided of a strong willing Englishman, Robert Best, one of the companies servants: whome the Russes with their champion refused.

So that we had the words of our privilege put in effect, which were to draw lots. The day and maner of triall appointed by the Emperour at his castle in his palace and high Court of Moscovia was thus:

The Emperour's two Treasurers, being also Chancelours and chiefe Judges, sate in court. They appointed officers to bring me, mine interpreter, and the other through the great presse within the

1. From *Henrie Lane*, "Letter from Russia", in Richard Hakluyt's "Principal Navigations, Voyages", etc., vol. II, p. 411 (Glasgow, MacLehose, 1903).

rayle or barre, and permitted me to sit downe some distance from them: the adverse parties being without at the barre. Both parties were first perswaded with great curtesie, to wit, I to enlarge mine offer, and the Russes to mitigate their challenge. Notwithstanding that I protested my conscience to be cleere, and their gaine by accompt to bee sufficient, yet of gentlenes at the magistrates request I made proffer of 100 robles more: which was openly commended, but of the plaintifes not accepted.

Then sentence passed with our names in two equall balles of waxe made and holden up by the Judges, their sleeves stripped up. Then, with standing up and wishing well to the trueth attributed to him that should be first drawen, by both consents among the multitude they called a tall gentleman, saying: Thou with such a coate or cap, come up: where roome with speede was made. He was commanded to hold his cappe, wherein they put the balles, by the crowne upright in sight, his arme not abasing. With like circumspection, they called at adventure another tall gentleman, commanding him to strip up his right sleeve, and willed him with his bare arme to reach up, and in Gods name severally to take out the two balles: which he did, delivering to either Judge one. Then with great admiration the lotte in ball first taken out was mine: which was by open sentence so pronounced before all the people, and to be the right and true parte.

The chiefe plaintifes name was Sheray Costromitsky. I was willed forthwith to pay the plaintifes the summe by me appointed. Out of which, for their wrong or sinne, as it was termed, they payd tenne in the hundred to the Emperour. Many dayes after, as their maner is, the people took our nation to be true and upright dealers, and talked of this judgement to our great credite.

### 32. Peter the Great's Trial and Condemnation of Alexius.<sup>1</sup>

#### *The Tsar presides at the Torture of his Own Son.*

[In April, 1682, Peter Naruishkin, then only 10 years of age, was proclaimed Tsar. Precocious, alert, and energetic, he was

1. From *R. Nisbet Bain*, "The First Romanoffs (1613-1725); a History of Muscovite Civilization and the Rise of Russia under Peter the Great and his Forerunners", p. 361, London, Constable, 1905.

well qualified to continue and complete the aims of his progressive father Theodore. While still a youth, he traveled through the Western countries, studying their advanced methods. At that period the Russian people and their government were in comparison deplorably backward. On his return, he set himself to occidentalize Russia and to introduce efficiency.

But against Peter, the Great, were arrayed powerful reactionary forces. The factions of rival feudal families and military officials intrigued to undermine and even to supplant him. Behind them was the sympathizing mass of the Muscovite people, whom he was striving to reform against their will.

Finally, in the early 1700s, these intriguers began to make use of Peter's son Alexius, the heir apparent. This youth, wild and dissolute and erratic in character, lent himself to these intrigues. Often and earnestly Peter sought to reclaim him, but in vain. Finally, the situation became precarious; for if Alexius should as the natural successor come to the throne, all of Peter's plans for the regeneration of Russia would come to naught.

He therefore determined to disinherit Alexius, forcing him to become a monk. Perhaps the more radical step of killing him was then also in his mind; for Peter was completely ruthless in executing any decision.

Peter had secured ample evidence of Alexius' complicity in a plan for mutiny of the army and a general revolt. He now proceeded to the form of a trial.]

Peter sent for Alexius, confronted him with the confession of Alexius' mistress Afrosina and reproached him for concealing material facts, and thereby forfeiting his pardon. The Tsarevich might very well have retorted that he had been inveigled home by a solemn promise of absolute and unconditional forgiveness which had been most ruthlessly and hypocritically broken; but at the sight of his father he collapsed. Nor should we too hastily reproach him with cowardice during this horrible ordeal. We have abundant testimony to the fact that Peter in his wrath was so appalling that the manliest and sturdiest of his subjects, when brought before him, shook as if in the grip of an ague. Alexius,

who was naturally rather a poor creature, must have been half-dead with terror. All he could do now was to try to save the miserable remnant of life that his tormentors might allow him to call his own, and this he obviously thought might be done by saying "yes" to everything. Yes, he *had* wished for his father's death; he *had* rejoiced when he heard of plots against his father; he *had* been ready to accept his father's throne from rebels and regicides.

All had now been said. At last the worst was known. It is true there were no actual facts to go upon. The Tsarevich had done nothing yet, whatever he might intend to do. His "evil designs" were still 'in foro conscientiae' and had not been, perhaps never would be, translated into practice. But all such considerations as these weighed not at all with the Tsar. In the eyes of Peter his son was now a self-convicted and most dangerous traitor. His life was forfeit. The future welfare of Russia imperatively demanded his speedy extinction.

But now a case for casuists arose, and Peter himself was casuist enough to recognise that it was a case of unusual and peculiar difficulty. Even if Alexius deserved a thousand deaths, there was no getting over the fact that his father had sworn "before the Almighty and His judgment seat," to pardon him and let him live in peace if he returned to Russia; and it was only on these conditions that Alexius (very foolishly, in the opinion of his friends) had placed himself once more in his father's hands. From Peter's point of view the question was: Did the enormity of the Tsarevich's crime absolve the Tsar from the oath which he had taken to spare the life of this prodigal son?

The question was solemnly submitted to a grand council of prelates, senators, ministers, and other dignitaries, on June 13, 1718. First the Tsar addressed the clergy. Although, he said, he had a perfect right to punish his son's crimes without consulting anybody, yet, nevertheless, lest he should sin against God unwittingly, and also because in all doubtful matters a man should never be his own sole counsellor, but especially because he, the Tsar, had bound himself by an oath, subsequently confirmed by writing, to

forgive "this my son," therefore, being mindful of all these things, he exhorted the archbishops and clergy, as the teachers of the Word of God, to search and find from Holy Scripture "what punishment was meet for this son who had wrought after the manner of Absalom," and give their opinion in writing "as became the guardians of the divine commandments and the faithful pastors of Christ's flock."

The temporal members of the council were exhorted to judge without fear and without respect of persons, fearing not to pronounce a lighter sentence than death if they thought such sentence just. "Do justice," proceeded the Tsar's declaration, "lest ye jeopardise your souls and mine likewise, that our consciences may be clear on the terrible Day of Judgment, and our country may at this present time be secure."

Five days later the clergy presented their memorial, which was signed by the Metropolitan of Moscow, two Greek metropolitans, five Russian bishops, four archimandrites, and two hieromonakhs. It was a cautious non-committal document, plainly inspired by fear, but unmistakably inclining to mercy. . . .

Peter was in a dilemma. There can, I think, be little doubt that he had at last determined to rid himself of his detested son; but he certainly shrank from a public execution, the scandal of which would have been enormous and its consequences incalculable. The temporal members of the council helped him out of his difficulty by expressing a desire to be quite convinced that Alexius had actually meditated rebellion against his father. If this were a genuine desire, it was no doubt a last effort of the Tsarevich's friends to save his life; but, in view of what ensued immediately afterwards, I am inclined to suppose, though I admit that there is no available evidence supporting the hypothesis, that it was a pretext for bringing the Tsarevich to the torture-chamber where he might very easily expire, as if by accident under legal process.

The most ordinary mode of administering the "question extraordinary" [i. e. torture] was by the terrible knout. The knout was a whip made of parchment cooked in milk, and so hard and sharp

that its strokes were like those of a sword. Those who were to be flogged with the knout generally had their backs bared, their arms tied behind them, and were then hoisted up by one arm to a sort of gallows. The executioner, with the knout in his hand, then took two or three running springs, the impetus of which enabled him to cut to the bone at each stroke. Practised executioners in Russia could kill a man with three strokes. There were few instances of anyone surviving thirty strokes.

It was to this torture that the Tsarevich Alexius, never very robust, and severely reduced by mental suffering and prolonged anxiety, was now to be submitted. It was hardly possible that he could survive it; the natural inference is that he was not intended to survive it. On June 19, Alexius received five-and-twenty strokes with the knout, and betrayed his confessor, Ignatev, who was also savagely tortured. On the 22nd Tolstoi was sent to see Alexius at the fortress of St. Peter and St. Paul, where he had been confined since the 14th; but beyond a vague confession of unworthiness and incompetence he could get nothing more out of his victim, simply because he had nothing more to tell. On June 24 Alexius received fifteen more strokes, but even the knout could now extract nothing. The mangled wretch could only feebly protest that he had revealed everything he knew.

On the same day the Senate condemned the Tsarevich to death for *imagining* rebellion against his father, and for *hoping* for the co-operation of the common people and the armed intervention of his brother-in-law, the Emperor. The solemn promise of the Tsar, which the clergy had ignored, was sophistically explained away by the Senators. The Tsar, they said, had only promised his son forgiveness if he returned willingly; he had returned unwillingly, and had, therefore, forfeited the promise. This shameful document, the outcome of mingled terror and obsequiousness, was signed by all the Senators and Ministers, and by three hundred persons of lesser degree. Among the signatures we find the names not only of such deadly enemies of the Tsarevich as Menshikov and Tolstoi, but the names of his secret friends and sympathisers, the Dolgorukies and the Golitsuins.

Two days later, June 26, 1718, the Tsarevich died in the Trubetskoi guard-house of the citadel of Petersburg, at six o'clock in the evening, while still under arrest, and on June 30 he was buried in the Petropavolsk Cathedral by the side of his consort, in the presence of his father and his stepmother. The precise manner of his death is still something of an enigma, most of the existing documents relating to it being apocryphal, the outcome of popular excitement and exaggeration.

## *Chapter 7*

# *SCANDINAVIA*

## SCANDINAVIA

33. A Trial at the Al-Thing in Ancient Iceland.<sup>1</sup>

*The Kindred of Njal seek Redress for his Murder.*

[The procedure in ancient Iceland enters into many of the sagas. The Saga of Burnt Njal is one continuous alternation of feuds and lawsuits. A short extract will vividly illustrate the style of litigation.

In this case of Mord vs. Flosi a series of disputes had ended in the siege of the house of Njal by Flosi and his men; the house had been fired, and Njal and his family were burnt to death. Now Njal "was so great a lawyer that his match was not to be found; all that he advised men was sure to be the best for them to do; gentle and generous, he unraveled every man's knotty point who came to see him about them". And so a great feud arose; but first the kinsfolk, led by Mord, sought redress at the Al-Ting. At the first meeting, notice of suit is given; at the ensuing one, the suit is heard:]

It was one day that men went to the Hill of Laws, and the chiefs were so placed that Asgrim Ellidagrim's son, and Gizur the White, and Gudmund the Powerful, and Snorri the Priest, were on the upper hand by the Hill of Laws; but the Eastfirthers stood down below.

Mord Valgard's son stood next to Gizur his father-in-law, he was of all men the readiest-tongued.

Gizur told him that he ought to give notice of the suit for manslaughter, and bade him speak up, so that all might hear him well.

[1] Then Mord took witness and said, "I take witness to this, that I give notice of an assault laid down by law against Flosi

1. From "Njal's Saga", translated from the Icelandic by Sir George Webbe Dasent, "The Story of Burnt Njal", 2 vols., 1869, chapter 140; reprinted in Everyman Series, London, Dent, and New York, Dutton.

## Chapter 7

33. *Trials at the Al-Thing in Ancient Iceland.*  
*The Kindred of Njal seek Redress for his Murder.*
34. *A Judgment of the King's Court in Old Denmark, A.D. 1551.*  
*Two Knights Quarrel in Church over the Coffin of a Relative.*

Thord's son, for that he rushed at Helgi Njal's son and dealt him a brain, or a body, or a marrow wound, which proved a death-wound, and from which Helgi got his death. I say that in this suit he ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need. I say that all his goods are forfeited, half to me and half to the men of the Quarter, who have a right by law to take his forfeited goods. I give notice of this suit for manslaughter in the Quarter Court into which this suit ought by law to come. I give notice of this lawful notice; I give notice in the hearing of all men on the Hill of Laws; I give notice of this suit to be pleaded this summer, and of full outlawry against Flosi Thord's son; I give notice of a suit which Thorgeir Thorir's son has handed over to me."

Then a great shout was uttered at the Hill of Laws; that Mord spoke well and boldly. . . .

After that Mord sat him down.

Flosi listened carefully, but said never a word the while. . . .

Kari Solmund's son declared his suits against Kol Thorstein's son, and Gunnar Lambi's son, and Grani Gunnar's son, and it was the common talk of men that he spoke wondrous well. . . .

After that other men gave notice of their suits, and it was far on in the day that it went on so.

Then men fared home to their booths.

Eyjolf Bolverk's son went to his booth with Flosi, they passed east around the booth and Flosi said to Eyjolf, "See'st thou any defence in these suits?" "None," says Eyjolf. "What counsel is now to be taken?" says Flosi. "I will give thee a piece of advice," said Eyjolf. "Now thou shalt hand over thy priesthood to thy brother Thorgeir, but declare that thou hast joined the Ting of Askel the Priest the son of Thorkettle, north away in Reykiardale; but if they do not know this, then may be that this will harm them, for they will be sure to plead their suit in the Eastfirthers' court, but they ought to plead it in the Northlanders' court, and they will overlook that, and it is a Fifth Court matter against them

if they plead their suit in another court than that in which they ought, and then we will take that suit up, but not until we have no other choice left." . . .

Now the time passes away till the courts were to go out to try suits. Both sides then made them ready to go thither, and armed them. Each side put war-tokens on their helmets. . . .

Now they all came together, and went straight to the court of Eastfirthers. They went to the court from the south, but Flosi and all the Eastfirthers with him went to it from the north. There were also the men of Reykiardale and the Axefirthers with Flosi. There, too, was Eyjolf Bolverk's son. Flosi looked at Eyjolf, and said, "All now goes fairly, and may be that it will not be far off from thy guess." "Keep thy peace about it," says Eyjolf, "and then we shall be sure to gain our point." . . .

Then lots were cast as to the declarations, and he, Mord, drew the lot to declare his suit first.

[2] Now Mord Valgard's son took witness the second time, and said, "I take witness to this, that I except all mistakes in words in my pleading, whether they be too many or wrongly spoken, and I claim the right to amend all my words until I have put them into proper lawful shape. I take witness to myself of this."

Again Mord said, "I take witness to this, that I bid Flosi Thord's son, or any other man who has undertaken the defence made over to him by Flosi, to listen for him to my oath, and to my declaration of my suit, and to all the proofs and proceedings which I am about to bring forward against him; I bid him by a lawful bidding before the court, so that the judges may hear it across the court." . . .

After that he spoke in these words, "I have called Thoro Thorodd as my first witness, and Thorbjorn as my second; I have called them to bear witness that I gave notice of an assault laid down by law against Flosi Thord's son", . . .

[3] Again Mord Valgard's son took witness. "I take witness to this," said he, "that I bid those nine neighbours whom I summoned when I laid this suit against Flosi Thord's son, to take

their seats west on the river-bank, and I call on the defendant to challenge this inquest, I call on him by a lawful bidding before the court so that the judges may hear." . . . . .

Now Flosi and his men went thither where the neighbours on the inquest sate. Then Flosi said to his men, "The sons of Sigfus must know best whether these are the rightful neighbours to the spot who are here summoned." Kettle of the Mark answered, "Here is that neighbour who held Mord at the font when he was baptized, but another is his second cousin by kinship." Then they reckoned up his kinship, and proved it with an oath.

Then Eyjolf took witness that the inquest should do nothing till it was challenged. A second time Eyjolf took witness, "I take witness to this," said he, "that I challenge both these men out of the inquest, and set them aside"—here he named them by name, and their fathers as well—"for this sake, that one of them is Mord's second cousin by kinship, but the other for gossipry, for which sake it is lawful to challenge a neighbour on the inquest; ye two are for a lawful reason incapable of uttering a finding, for now a lawful challenge has overtaken you, therefore I challenge and set you aside by the rightful custom of pleading at the Al-Ting, and by the law of the land; I challenge you in the cause which Flosi Thord's son has handed over to me."

Now all the people spoke out, and said that Mord's suit had come to naught, and all were agreed in this that the defence was better than the prosecution.

Then Asgrim said to Mord, "The day is not yet their own, though they think now that they have gained a great step; but now some one shall go to see Thorhall my son, and know what advice he gives us." Then a trusty messenger was sent to Thorhall, and told him as plainly as he could how far the suit had gone, and how Flosi and his men thought they had brought the finding of the inquest to a deadlock. "I will so make it out," says Thorhall, "that this shall not cause you to lose the suit; and tell them not to believe it, though quirks and quibbles be brought against them, for that wiseacre Eyjolf has now overlooked something. But now thou shalt go back as quickly as thou canst, and say that Mord Val-

gard's son must go before the court, and take witness that their challenge has come to naught," and then he told him step by step how they must proceed.

The messenger came and told them Thorhall's advice.

[4] Then Mord Valgard's son went to the court and took witness. "I take witness to this," said he, "that I make Eyjolf's challenge void and of none effect; and my ground is, that he challenged them not for their kinship to the true plaintiff, the next of kin, but for their kinship to him who pleaded the suit; I take this witness to myself, and to all those to whom this witness will be of use." After that he brought that witness before the court. Now he went whither the neighbours sate on the inquest, and bade those to sit down again who had risen up, and said they were rightly called on to share in the finding of the inquest.

Then all said that Thorhall had done great things, and all thought the prosecution better than the defence.

Then Flosi said to Eyjolf, "Thinkest thou that this is good law?" "I think so, surely," he says, "and beyond a doubt we overlooked this; but still we will have another trial of strength with them."

[5] Then Eyjolf took witness. "I take witness to this," said he, "that I challenge these two men out of the inquest"—here he named them both—"for that sake that they are lodgers, but not householders; I do not allow you two to sit on the inquest, for now a lawful challenge has overtaken you; I challenge you both and set you aside out of the inquest, by the rightful custom of the Al-ting and by the law of the land." Now Eyjolf said he was much mistaken if that could be shaken; and then all said that the defence was better than the prosecution.

Now all men praised Eyjolf, and said there was never a man who could cope with him in lawcraft. . . . .

[6] Then Mord went to the court and took witness. "I take witness to this, that I bring to naught Eyjolf Bolverk's son's challenge, for that he has challenged those men out of the inquest

who have a lawful right to be there; every man has a right to sit on an inquest of neighbours, who owns three hundreds in land or more, though he may have no dairy-stock; and he too has the same right who lives by dairy-stock worth the same sum, though he leases no land." Then he brought this witness before the court, and then he went whither the neighbours on the inquest were, and bade them sit down, and said they were rightfully among the inquest.

Then there was a great shout and cry, and then all men said that Flosi's and Eyjolf's cause was much shaken, and now men were of one mind as to this, that the prosecution was better than the defence.

Then Flosi said to Eyjolf, "Can this be law?"

Eyjolf said he had not wisdom enough to know that for a surety, and then they sent a man to Skapti, the Speaker of the Law, to ask whether it were good law, and he sent them back word that it was surely good law, though few knew it.

[7] Then this was told to Flosi, and Eyjolf Bolverk's son asked the sons of Sigfus as to the other neighbours who were summoned thither. They said there were four of them who were wrongly summoned; "for those sit now at home who were nearer neighbours to the spot."

Then Eyjolf took witness that he challenged all those four men out of the inquest, and that he did it with lawful form of challenge. . . .

And now it was plain in everything that Flosi and Eyjolf were very boastful; and there was a great cry that now the suit for the burning was quashed, and that again the defence was better than the prosecution.

[8] Then Asgrim spoke to Mord, "They know not yet of what to boast ere we have seen my son Thorhall. Njal told me that he had so taught Thorhall law, that he would turn out the best lawyer in Iceland whenever it were put to the proof." Then a man was sent to Thorhall to tell him how things stood, and of Flosi's and Eyjolf's boasting, and the cry of the people that the suit for the

burning was quashed in Mord's hands. "It will be well for them," says Thorhall, "if they get not disgrace from this. Thou shalt go and tell Mord to take witness, and swear an oath, that the greater part of the inquest is rightly summoned". . . . Then Mord went to the court, and took witness, and swore an oath that the greater part of the inquest was rightly summoned. . . .

Then there was a great roar that Mord handled the suit well; but it was said that Flosi and his men betook them only to quibbling and wrong.

Flosi asked Eyjolf if this could be good law, but he said he could not surely tell, but said the Lawman must settle this knotty point.

Then Thorkel Geiti's son went on their behalf to tell the Lawman how things stood, and asked whether this were good law that Mord had said.

"More men are great lawyers now," says Skapti, "than I thought. I must tell thee, then, that this is such good law in all points, that there is not a word to say against it; but still I thought that I alone would know this, now that Njal was dead, for he was the only man I ever knew who knew it."

Then Thorkel went back to Flosi and Eyjolf, and said that this was good law. . . .

[9] Then the neighbours on Mord's inquest went to the court, and one uttered their finding, but all confirmed it by their consent; and they spoke thus, word for word, "Mord Valgard's son summoned nine of us thanes on this inquest, but here we stand five of us, but four have been challenged and set aside, and now witness has been borne as to the absence of the four who ought to have uttered this finding along with us, and now we are bound by law to utter our finding. . . . And now we have all sworn an oath, and found our lawful finding, and are all agreed, and we utter our finding against Flosi, and we say that he is truly guilty in this suit. We nine men on this inquest of neighbours so shapen, utter this our finding before the Eastfirthers' Court over the head of John, as Mord summoned us to do; but this is the finding of all of us."



# 34. A Judgment of the King's Court in Old Denmark, A.D. 1551.<sup>1</sup>

## *Two Knights Quarrel in Church over the Coffin of a Relative.*

[The scene of the ensuing episode lay in the southland of what is now Sweden,—an area at that time under the King of Denmark; but the Court's hearing took place across the straits in Copenhagen.

The action was for insult and defamation uttered of one knight by another, charging the former with causing the death of his stepson.

The relationships of the parties and the sequence of events were as follows: Sir Trud Ulfstand (long deceased) had had from a first wife a son *Lage Ulfstand*, the now *defendant*; and then, marrying Lady Giörlid, had a second son, Niels, who in 1548 was perhaps 15 years of age.

Lady Giörlid, widow of Sir Trud Ulfstand, had then married Sir *Lage Bragde*, the now *plaintiff* who thus obtained the custody of young Niels, and Niels died while in this custody in 1548. The elder son, Lage Ulfstand, already on bad terms with his stepmother's new husband, Sir Bragde, becomes suspicious about the death of his young stepbrother, and publicly blames it upon Sir Bragde at the funeral. Hence the lawsuit.

Note that, this being the King's Supreme Court, the judgment speaks in the King's name; "We", "Us", and "Our".]

[*The Judgment Record speaks*] Appeared before Us, at a session of Our court, Our well-beloved Sir Lage Bragde, knight, Our liegeman and vassal, and also Our well-beloved Lage Ulfstand, Our liegeman and vassal and warden of Our Castle of Varberg, and upon hearing the circumstances of their discords and dissensions, We have pleased to call both parties before Us in court.

[*Sir Bragde's story*] The said Sir Lage Bragde deposes that Sir Trud Ulfstand, now in God's blessed care, left behind him a

son Niels, by his wife who is now the wife of Sir Bragde. The boy lived with his mother, but by her desire and consent Sir Bragde took the boy, his stepson, with him on a journey to Missen. On the return journey, they came to Laaland, where the boy became ill nigh unto death. A servant was placed in charge to care for and watch over him, and so they went on to Copenhagen, and then to Landskrone, the boy, his stepson Niels, being with him. There he hired two carriages, to take Niels and the servant and the luggage with him to go to the town Törlöse, the said Niels by this time having become well and strong again. But as Niels left Landskrone he caught a chill and fell ill once more. The servant bundled him up in Sir Bragde's featherbed, and they came to the town Törlöse. Niels' illness continued, and at Törlöse he died.

[*The Judgment Record speaks*] Thereupon Sir Bragde laid before the Court depositions which he had taken from the servant who had accompanied them on the journey and the two drivers of the carriages, affirming that they had not driven at night, nor had the carriages been overturned, nor had they met any spook on the way.

[*Sir Bragde's story resumed*] Then Sir Bragde rode home to his wife, Lady Giörlid, and told her of the death of Niels. She then requested Sir Bragde to arrange a suitable funeral for her son and to have him interred at Lund alongside his father, Sir Trud Ulfstand. This Sir Bragde proceeded to do, first sending a written notice to the kindred and friends, that they might accompany him and attend the funeral.

But, inasmuch as at this time there existed disagreement and strife between him, Sir Bragde, and Lage Ulfstand, Niels' elder stepbrother, he decided to send no notice to Lage Ulfstand. For, though Sir Bragde was conscious of being in no way responsible for Niels' death, yet rumor reported Ulfstand as having said that the carriage of Niels had been carelessly driven, or had overturned, or that a spook or other evil thing had injured him at night.

So Sir Bragde caused to be prepared a deposition signed by Our well-beloved Sir Hans Skoffgard, knight, Sti Porse, Otte Bragde, Kield Lunge, Iver Lunge, Erich Basse, and Jörgen Jensen,

1. From "Udvalg of Gamle Dauske Domme, afsagte paa Kongens Rette-  
terting og paa Landsting" (Selection of Old Danish Judgments rendered  
by the King's Supreme Court and by the National Assembly), ed. J. L. A. Kol-  
derup-Rosenvinge, Copenhagen, 1842; vol. I, No. 79, p. 159.

at Lund on St. Martin's Eve, 1548, affirming that Sir Bragde had upon his sacred oath narrated to them all the circumstances, as above set forth, from the first to the last moment of the journey with the boy Niels.

But when the funeral took place, Lage Ulffstand was not satisfied with this story, although Sir Bragde showed that he had there in the church a living witness who was with Niels from the time he first fell ill until the time when he died, and who with his sacred oath would confirm the statements of Sir Bragde. Whereupon Lage Ulffstand, declaring that he was not satisfied, with his fist struck the bier on which lay the corpse, and averred that either he would see his brother's corpse before it was interred or else he would straightway deal dole, etc., etc.

[*The Judgment Record resumed*] Then Sir Bragde presented a deposition, signed by the above-named worthy men on the same day, year, and place, affirming that Lage Ulffstand had at the bier asserted that Sir Bragde had directed a peasant to take Niels from Landskrone in a carriage, and that a spook had come out of the forest and kissed Niels to death [!], and that for this reason he Ulffstand insisted on viewing the body before it was interred. And further, that Ulffstand had thereupon brandished a firearm and threatened Sir Bragde. And further, that Sir Bragde then said to Ulffstand, "If it were not for the knight's covenant of loyal peace which my lord the King has taken from me, I would ill brook such behavior of yours". And that Ulffstand then said to Sir Bragde, "If you are so blameless as you claim to be about my brother's death, then you would willingly let me view his corpse". And then Sir Bragde replied that he would indeed let the corpse be seen, and struck his fist upon the bier on which the corpse lay.

Then another deposition was produced which the said Sir Hans Skoffgard, knight, Sti Porse, Kield Lunge, and Erich Basse had signed at Lund on St. Martin's Eve, 1548, affirming that, when the corpse of Niels was taken into the cathedral at Lund, Lage Ulffstand had demanded to view the said corpse before it was interred; to which demand Sir Bragde had assented; and that then and there, in the presence of many Danish men and women, the corpse

was taken out of the coffin and the cere-cloths drawn down from the head to the knees. And that there were seen plainly and clearly, on the side up under the left arm and shoulder, marks showing that the boy had died from a fatal pestilence, and not from any other cause, etc. All of which is affirmed in the said deposition, with other details.

[*Sir Bragde's story resumed*] So Sir Bragde affirmed that by these depositions it appears that Lage Ulffstand uttered defamatory insults about him, and moreover that, having come to the funeral at Lund for the purpose, Lage Ulffstand had threatened and menaced him with his firearm, demanding to see the corpse before its interment, and uttering many angry and evil words against Sir Bragde. And that Lage Ulffstand had thereby violated the covenant which Our well-beloved Erik Banner, the Royal Marshal of Denmark, had pursuant to Our orders taken from the Liegemen, that they should abstain from quarreling both in deed and in word.

[*Lage Ulffstand's story*] To the foregoing replied Lage Ulffstand as follows:

That he had never uttered words casting upon Sir Bragde liability or blame for the brother's death, although other persons had made such statements. That he had not known of his brother's illness and death until he had heard that the brother was to be buried. That therefore he began to wonder how it was that neither he nor any of his other brothers or sisters had received any written notice to enable them to attend the funeral, which notice they should have received. That nobody could reproach him for desiring to learn how the brother had come to his death. That therefore it was nought amiss for Lage Ulffstand with his other brothers to ride to the place of the funeral. That there, with his four companions, he had demanded of Sir Bragde to say whether or no that was their brother who lay dead, and had in friendly manner requested Sir Bragde to let them view the corpse before it was interred. That Sir Bragde had replied that he was now going to have the corpse interred whether they liked it or not, with other words of the sort. That thereupon Lage Ulffstand had requested the worthy men there present to remind Sir Bragde of the cove-

nant which they had taken to Us before Our said Marshal Erik Banner, and of Sir Bragde's disloyalty to that pledge in refusing to allow a view of the brother's corpse; but those worthy men refused to do this, not desiring to be involved in the quarrel. And that straightway thereon the parson went up into the pulpit and preached, but that, when the preaching was ended, Sir Bragde shouted to the bearers to carry the body to the grave. That thereupon Lage Ulffstand and his brother and their man laid hold of the bier on which the body lay, and many harsh words were exchanged, some of them indeed being improper. That then Sir Bragde demanded of Lage Ulffstand whether he meant to assert that Sir Bragde was responsible for the brother's death; to which Lage Ulffstand replied that when he had seen his brother's body, and found anything wrong with it, he would certainly hold Sir Bragde responsible; but not before then.

And the said Lage Ulffstand declares that therein he sees no violation of the covenant of peace which they had both taken to Erik Banner by Our behest, inasmuch as he drew neither sword nor dagger upon Sir Bragde, nor had he done him any manner of hurt; for it was only after Sir Bragde with rude language had reviled him for wanting to view his brother's body, that he Lage Ulffstand had retorted with other rude words in the same fashion with which he had been addressed. And that therein he could see nothing wrongful on his part.

[*The Judgment Record resumed*] Then ensued much more talking and arguing on both sides.

So after considering the said allegations, replies, depositions, and proofs, presented before Us according to law, and taking into view all the circumstances of the case, We pronounce for judgment:

[1] That the said Sir Bragde is without blame for Niels Ulffstand's death, and goes quit therefor;

[2] That the said Lage Ulffstand has neither alleged nor spoken anything to Sir Bragde for which he Ulffstand can be charged with liability in any way;

[3] But that, as to the covenant of peace taken by the said Sir Bragde and Ulffstand before Erik Banner at Our behest, the said Sir Bragde and Ulffstand are equally culpable.

Given at Kopenhagen the Thursday before St. Michael's Day, in Our presence; witness Our well-beloved Johan Früs, Our chancellor, Erik Banner, Denmark's Royal Marshal, Sir Anders Bylde, Sir Otthe Krumpen, Sir Per Skrum, knights, Børge Trolle, Oluff Munch, Erick Biller, Eyler Hardenbiere, Jörgen Løcke, Tage Totte, Claus Urne, Verner Pasberg, Knud Mogens, Gabriel Cjyldenstjerne, and Erick Krabbe, Our loyal lieges and Councillors, A.D. 1551.

*Chapter 8*  
*SUNDRY REGIONS*

## SUNDRY REGIONS

### 35. Summary Trial of a Cruel Governor in Switzerland, A.D. 1474.<sup>1</sup>

#### *The Townspeople at last Throw Off his Yoke.*

[Near to the free Swiss city of Basel was the town and fortress of Breisach, held by the Duke of Burgundy as a fief in pledge from the Emperor Sigismund. Its Governor was Sir Archibald de Hagenbach. His cruel oppression of the neighboring regions finally led to a revolt. The citizens of Basel attacked, overcame, and captured the cruel governor, and promptly put him on trial.]

Such was the detestation in which this cruel Governor was held, that multitudes flocked in from all quarters to be present at his trial. He heard from his prison the bridge re-echo with the tread of horses, and would ask of his jailer respecting those who were arriving, whether they might be his judges, or those desirous of witnessing his punishment. Sometimes the jailer would answer, "These are strangers whom I know not." "Are not they," said the prisoner, "men meanly clad, tall in stature, and bold mien, mounted on short-eared horses?" And if the jailer answered in the affirmative—"Ah, these are the Swiss," cried Hagenbach. "My God, have mercy on me!" and he recalled to mind all the insults and cruelties he had heaped upon them. He considered, but too late, that their alliance with the House of Austria had been his destruction.

On the 4th of May, 1474, after being put to the torture, he was brought before his judges in the public square of Breisach, at the instance of Hermann d'Eptingen, who governed for the Archduke. His countenance was firm, as one who fears not death. Henry Iselin of Bale first spoke in the name of Hermann d'Eptingen, who acted for the lord of the country. He proceeded in nearly these terms: "Peter de Hagenbach, knight, steward of my lord the Duke of Burgundy, and his Governor in the country of Seratte and Haute

1. From *De Barante*, as quoted by Sir Walter Scott in Note to Chap. XVI of "Anne of Gelerstein."

## Chapter 8

35. *Summary Trial of a Cruel Governor in Switzerland, A. D. 1474.  
The Townspeople at last Throw Off his Yoke.*
36. *A Trial under the Holy Inquisition of Heresy at Minorca, A. D. 1587.  
An Englishman survives the Torture.*
37. *Court-Martial of an English Prisoner-of-War in Spain, A. D. 1626.  
The Accused challenges the Court to Single Combat.*
38. *A Blood-Feud Trial in Modern Montenegro.  
Balancing the Blood-Account regardless of Guilt.*
39. *Summary Justice on a Foreigner in Madrid, A. D. 1839.  
A Bible Peddler has a bold verbal Bout with a Magistrate.*

Alsace, was bound to observe the privileges reserved by act of compact. But he has alike trampled under foot the laws of God and man, and the rights which have been guaranteed by oath to the country. He has caused four worshipful burgesses of Seratte to be put to death without trial. He has spoiled the city of Breisach, and established there judges and consuls chosen by himself. He has broken and dispersed the various communities of burghers and craftsmen. He has levied imposts of his own will. Contrary to every law, he has quartered upon the inhabitants soldiers of various countries—Lombards, French, men of Picardy, and Flemings—and has encouraged them in pillage and disorder. He has even commanded these men to butcher their hosts during night, and had caused boats to be prepared to embark therein women and children to be sunk in the Rhine. Finally, should he plead the orders which he had received as an excuse for these cruelties, how can he clear himself of having dishonoured so many women and maidens, even those under religious vows?"

Other accusations were brought against him by examination, and witnesses proved outrages committed on the people of Mulhausen and the merchants of Bale.

That every form of justice might be observed, an advocate was appointed to defend the accused. "Messire Peter de Hagenbach," said he, "recognizes no other judge or master than my lord the Duke of Burgundy, whose commission he bore, and whose orders he received. He had no control over the orders he was charged to execute; his duty was to obey. Who is ignorant of the submission due by military retainers to their lord and master? Can any one believe that the landvogt of my lord the Duke could remonstrate with or resist him? And has not my lord confirmed and ratified by his presence all acts done in his name? If imposts have been levied, it was because he had need of money; to obtain it, it was necessary to punish those who refused payment: this proceeding my lord the Duke, and the Emperor himself, when present, have considered as expedient. The quartering of soldiers was also in accordance with the orders of the Duke. With respect to the jurisdiction of Breisach, could the landvogt permit any resistance from that quar-

ter? To conclude, in so serious an affair—one which touches the life of the prisoner—can the last accusation be really considered a grievance? Among all those who hear me, is there one man who can say he has never committed similar imprudences? Is it not evident that Messire de Hagenbach has only taken advantage of the good-will of some girls and women, or, at the worst, that his money was the only restraint imposed upon them?"

The judges sat for a long time on the tribunal. Twelve hours elapsed before the termination of the trial. The Knight of Hagenbach, always calm and undaunted, brought forward no other defence or excuse than what he had before given when under the torture—namely, the orders and will of his lord, who alone was his judge, and who alone could demand an explanation.

At length, at seven in the evening, and by the light of torches, the judges, after having declared it their province to pronounce judgment on the crimes of which the landvogt was accused, caused him to be called before them, and delivered their sentence, condemning him to death. He betrayed no emotion, and only demanded as a favour that he should be beheaded. Eight executioners of various towns presented themselves to execute the sentence; the one belonging to Colmar, who was accounted the most expert, was preferred.

Before conducting him to the scaffold, the sixteen knights, who acted as judges, required that Messire de Hagenbach should be degraded from the dignity of knight, and from all his honours. Then advanced Gaspar Hurter, herald of the Emperor, and said: "Peter de Hagenbach, I deeply deplore that you have so employed your mortal life that you must lose not only the dignity and honour of knighthood, but your life also. Your duty was to render justice, to protect the widow and orphan, to respect women and maidens, to honour the holy priests, to oppose every unjust outrage; but you have yourself committed what you ought to have opposed in others. Having broken, therefore, the oaths which you have sworn, and having forfeited the noble order of knighthood, the knights here present have enjoined me to deprive you of its insignia. Now, perceiving them on your person at this moment, I proclaim you un-

worthy Knight of Saint George, in whose name and honour you were formerly admitted in the order of knighthood." Then Hermann d'Eptingen advanced. "Since you are degraded from knighthood, I deprive you of your collar, gold chain, ring, poignard, spur, and gauntlet." He then took them from him, and, striking him on the face, added: "Knights, and you who aspire to that honour, I trust this public punishment will serve as an example to you, and that you will live in the fear of God, nobly and valiantly, in accordance with the dignity of knighthood and the honour of your name." At last the provost of Einsilheim, and marshal of that commission of judges, arose, and addressing himself to the executioner—"Let justice be done!"

All the judges, along with Hermann d'Eptingen, mounted on horseback; in the midst of them walked Peter de Hagenbach between two priests. It was night, and they marched by the light of torches; an immense crowd pressed around this sad procession. The prisoner conversed with his confessor, with pious, collected, and firm demeanour, recommending himself to the prayers of the spectators. On arriving at a meadow without the gate of the town, he mounted the scaffold with a firm step, and elevating his voice, exclaimed:—

"I fear not death, I have always expected it; not, indeed, in this manner, but with arms in my hand. I regret alone the blood which mine will cause to be shed; my lord will not permit this day to pass unavenged. I regret neither my life nor body. I was a man—pray for me!" He conversed an instant more with his confessor, presented his head, and received the blow.

### 36. A Trial under the Holy Inquisition of Heresy at Minorca, A.D. 1587.<sup>1</sup>

#### *An Englishman survives the Torture.*

[In May, 1582, Richard Hasleton sailed on board the "Mary Marten", with cargo destined for Turkey. The voyage safely

1. From *Richard Hasleton*, "Strange and Wonderful Things happened to Richard Hasleton"; first printed by Barley, London, 1595; reprinted in "Voyages and Travels", edited *C. R. Beazley*, London, Constable, 1903, Vol. II, p. 156.

made, they were on their way homeward near the coast of Spain, when a pirate galley from Algiers attacked them, sank the ship, and captured all the survivors. After four years' service as a galley-slave, Hasleton finally escaped with others and got ashore on the island of Majorca, then a part of the Spanish dominions. A companion told the local authorities that Hasleton was an English Lutheran in religion; whereon he was put in prison.]

Now, because I had in no respect offended them, I demanded, Wherefore they molested me? saying, It was contrary to the law and the profession of Christians.

Then did they ask me, If I had spoken anything against the King, and against the Church of Rome? I answered, "Nothing!"

Then they told me, I should be sent to Majorca, to answer before the Inquisition. . . .

Then were the Officers of the Inquisition sent for by the Captain; which came the second day after our coming there [i. e. to Palma]: and at their coming, they offered me the Pax, which I refused to touch. Whereupon they reviled me, and called me "Lutheran!" [and] taking me presently out of the galley, carried me on shore in Majorca: and finding the Inquisitor walking in the market place, [they] presented me to him, saying, "Here is the prisoner!"

He immediately commanded me to prison; whither they carried me, and put a pair of shackles on my heels. Where I remained two days.

Then was I brought forth into a church, where the Inquisitor sat usually in judgement. Who being ready set, commanded me to kneel down and to do homage to certain images which were before me. I told him, "I would not do that which I knew to be contrary to the commandments of Almighty God; neither had I been brought up in the Roman law, neither would I submit myself to it." He asked me, Why I would not? I answered, "That whereas in England, where I was born and brought up, the Gospel was truly preached, and maintained by a most Gracious Princess, therefore I would not commit idolatry, which is utterly condemned by the Word of God."

Then he charged me to utter the truth, otherwise I should abide the smart.

Then was a stool set, and he commanded me to sit down before him; and offered me the cross, bidding me reverently to lay my hand upon it, and urged me instantly to do it: which moved me so much, that I did spit in the Inquisitor's face; for which the Scribe gave me a good buffet on the face. So, for that time, we had no more reasoning. For the Inquisitor did ring a little bell to call the Keeper; and [he] carried me to ward again.

And the third day, I was brought forth again to the place aforesaid.

Then the Inquisitor asked me, What I had seen in the churches of England? I answered, That I had seen nothing in the Church of England but the Word of God truly preached.

Then he demanded, How I had received the Sacraments? I replied, That I had received them according to the institution of Christ: that is, I received the bread in remembrance that Christ in the flesh died upon the cross for the redemption of man.

"How", said he, "hast thou received the wine?" Whereto I replied and said, That I received the wine in remembrance that Christ shed his blood to wash away our sins.

He said, It was in their manner? I said, "No."

Then he charged me to speak the truth, or I should die for it.

I told him, "I did speak the truth; and would speak the truth: for," said I, "it is better for me to die guiltless than guilty."

Then did he, with great vehemency, charge me again to speak the truth; and sware by the Catholic Church of Rome, that if I did not, I should die in fire. Then I said, "If I died in the faith which I had confessed, I should die guiltless:" and told him he had made a vain oath. And so I willed him to use no circumstance to dissuade me from the truth: "for you cannot prevail. Though I be now in your hands, where you have power over my body; yet have you no power over my soul." I told him, he made a long matter far from the truth.

For which, he said I should die. Then he bade me say what I could to save myself.

Where I replied, as followeth: Touching the manner of the receiving of Sacraments, where he said "it was like to theirs", "you," said I, "when you receive the bread, say it is the very body of Christ; and likewise you affirm the wine to be his very blood." Which I denied; saying it was impossible for a mortal man to eat the material body of Christ, or to drink his blood.

Then he said, I had blasphemed the Catholic Church. I answered, That I had said nothing against the true Catholic Church; but altogether against the false Church.

He asked, How I could prove it? saying if I could not prove it, I should die a most cruel death.

(Note, by the way, that when any man is in durance for religion; he is called to answer before no open assembly: but only in the presence of the Inquisitor, the Secretary, and the Solicitor whom they term the Broker. The cause is, as I take it, because they doubt [i. e. fear] that very many of their own people would confess the Gospel, if they did but see and understand their absurd dealing. Again, to the matter).

Because it was so secret, they urged me to speak the more.

Then he inquired, Whether I had ever been confessed? I said, "Yes."

He demanded, "To whom?" I said "To God."

He asked me, If I had ever confessed to any Friar? I said, "No, for I do utterly defy them. For how can he forgive me my sins, which is himself a sinner; as all other men are."

"Yes," said he, "he which confesseth himself to a Friar who is a Father may have remission of his sins by his mediation." "Which," I said, "I would never believe."

Wherefore seeing they could seduce me, by no means, to yield to their abominable idolatry; the Secretary cried, "Away with him!" The Inquisitor and he frowned very angrily on me for



the answers which I had given: and said, They would make me tell another tale. So, at the ringing of a little bell, the Keeper came and carried me to ward again.

At my first Examination, when the Keeper should lead me away: the Inquisitor did bless me with the cross; but never after.

Two days after was I brought again, and set upon a stool before the Inquisitor. He bade me ask *misericordiam*.

I told him, "I would crave mercy of Jesus Christ who died for my sins. Other *misericordiam* would I crave none!"

Then he commanded me to kneel before the altar. I said, "I would; but not to pray to any image. For your altar is adorned with many painted images which were fashioned by the hands of sinful men; which have mouths, and speak not; ears, and hear not; noses, and smell not; hands, and handle not; feet have they, and walk not—which God doth not allow at his altar, for he hath utterly condemned them by his Word."

Then he said, I had been wrong taught. "For," said he, "who-soever shall see these figures in earth may the better remember him in heaven whose likeness it doth represent, who would be a Mediator to God for us." But I replied, That all images were an abomination to the Lord: for he hath condemned them in express words by his own mouth, saying, "Thou shalt not make thyself any graven image, &c."

"Yes," said he, "but we have need of a Mediator to make intercession for us: for we are unworthy to pray to God ourselves, because we are vile sinners." I said, "There was no Mediator but Jesus Christ."

Where, after many absurd reasons and vain persuasions, he took a pause.

Then I asked him, Why he kept me so long in prison, which never committed offence to them: knowing very well that I had been captive in Argire [Algiers] near five years' space [July 1582 to April 1587]: saying, "That when God, by his merciful providence, had, through many great dangers, set me in a Christian country, and delivered me from the cruelty of the Turks; when I thought to

find such favour as one Christian oweth to another, I found them now more cruel than the Turks, not knowing any cause Why."

"The cause," said he, "is because the King [of Spain] hath wars with the Queen of England." For at that instant [April 1587], there was their Army [Armada] prepared ready to go for England. Whereupon they would, divers times, give me reproachful words; saying, That I should hear shortly of their arrival in England. With innumerable vain brags, which I omit for brevity.

Then did I demand, "If there were not peace between the King and the Queen's Majesty; whether they would keep me still?" "Yea," said he, "unless thou wilt submit thyself to the faith of the Romish Church." So he commanded me away.

I asked, Wherefore he sent for me; and to send me away, not alleging any matter against me? He said, I should have no other matter alleged but that which I had spoken with mine own mouth.

Then I demanded, "Why they would have the Romish Church to have the supremacy?" Whereto he would make no answer.

Then I asked, "If they took me to be a Christian?" "Yes," said he, "in some respect; but you are out of the faith of the true Church."

Then the Keeper took me to prison again.

And after, for the space of three weeks, I was brought forth to answer three several times every week. . . . .

After all this, he commanded to put me in the dungeon within the Castle [i. e. of Palma], five fathoms [30 feet] under ground; giving me, once a day, a little bread and water. There remained I one whole year [April, 1587 to April, 1588], lying on the bare ground, seeing neither sun nor moon; no, not hearing man woman nor child speak, but only the Keeper which brought my small victual. . . . .

[He managed to escape, but was re-captured.]

Then they bound me hands and feet, laid me on a mule, and carried me back again to [Palma] the city of Majorca; delivering me to the Inquisitor: who, when he had sent me to prison, com-

manded a pair of bolts to be put on my legs, and an iron clasp about my neck, with a chain of five fathoms long hanging thereat; which was done accordingly.

And on the morrow [13th May, 1588], I was brought forth to the accustomed place, and in the same manner: where the Inquisitor sitting, asked first Why I had broken prison, and run away? I said, "To save my life."

"Yes," said he, "but now thou hast offended the law more than before; and therefore shall the law be now executed upon thee."

Then I was carried away again. And immediately there was called an assembly of citizens, and such as were seen in the law, to counsel, and to take advice, What punishment they might inflict upon me?

Which being deliberated, I was brought forth again; and carried to the Place of Torment: which was in a cell or vault underground.

There were present but four persons, that is to say, The Inquisitor, The Solicitor, or Broker, who is to see the law executed, A Dutch woman that dwelt in the city; who was commanded thither to tell them what I spake; because I spake many times in the Dutch tongue. And lastly, the Tormentor.

The rack now standing ready before them; with seven flaxen ropes lying thereon, new bought from the market.

Then the Inquisitor charged me, as at all other times he used to do, That I should speak what I had to say, and to speak the truth; otherwise I should be even now tormented to death.

I, seeing myself in the hands of such cruel tyrants as always thirst after the blood of the innocent; even as Cain (who being wroth with his brother Abel, and carrying a heavy countenance) could be no way eased but with his brother's blood: so I, past hope of life, turned my back towards them, and seeing my torments present before me, I fell down on my knees, and besought the Lord to forgive my sins, and to strengthen my faith, and to grant me patience to endure to the end.

Then they took into a void room, and stripped me out of my ornaments of sheepskins which I repeated [spoke of] before; and put a pair of strong canvas breeches upon me. Then bringing me to the rack again, he commanded me to lie down. The bars of the rack under me were as sharp as the back of a knife. Now I, willingly yielding myself, lay down. Then the Tormentor bound my hands over my breast crosswise; and my legs, clasped up together, were fast tied the one foot to the other knee. Then he fastened to either arm a cord, about the brawn of the arm; and likewise to either thigh another; which were all made fast again under the rack to the bars: and with another cord he bound down my head; and put a hollow cane into my mouth. Then he put four cudgels into the ropes which were fastened to my arms and thighs.

Now the woman which was present, being interpreter, began to persuade me to yield, and confess the faith of the Church of Rome. I answered, "If it were the will of God that I should end my life under their cruel hands, I must be content; but if it please him, he is able to deliver me, if there were ten thousands against me."

Then the Tormentor, as he was commanded, began to wrest the ropes; which he did by little and little, to augment my pains, and to have them endure the longer: but, in the end, he drew them with such violence as though he would have plucked my four quarters in sunder; and there stayed a good space.

Yet to declare their tyrannical malice, thinking my torment not sufficient, he added more: pouring water through a cane which was in my mouth, by little and little, which I was constrained either to let down, or to have my breath stopped until they had tunned in such quantity as was not tolerable to endure; which pained me extremely.

Yet not satisfied, they took and wet a linen cloth, and laid it over my mouth till I was almost strangled; when my body, being thus overcharged with such abundance of water, after they had thus stopped my breath with the wet cloth, suddenly with the force of my breath and that my stomach was so much overcharged, the water gushed out, and bare away the cloth as if had been the force of a conduit spout. . . . .

Then the woman again bade me yield; saying, It were better to yield than to die so miserable a death. . . .

Then the Inquisitor asked her, What I said? She answered, That I had said I would never submit myself to the Church of Rome.

Then did he most vehemently charge me to yield and submit myself to the Romish Church; otherwise he would pluck off one of my arms. Whereupon I denying still, the Tormentor, in most cruel manner, wrested the ropes as if he would have rent my body in sunder. I (being now in intollerable pains; and looking for nothing but present death) cried out, in the extremity of my anguish, "Now, farewell wife and children! and farewell England!"; and so, not able to utter one word more, lay even senseless.

The Inquisitor asked the woman again, What I said? She laid her hand upon my head, and perceiving that I was speechless, told him, I was dead.

Wherefore the Tormentor loosed the ropes, unbound my hands and feet, and carried me into a chamber which they termed St. Walter's Chamber. Where I came to myself, and received some sense and reason; but could have no feeling of any limb or joint. Thus I lay in a most lamentable and pitiful manner for five days [? 14th-18th May 1588], having a continual issue of blood and water forth of my mouth all that space, and being so feeble and weak, by reason of my torments, that I could take no sustenance.

. . . . .

After this, they carried me to the chamber [St. Walter's Chamber] from whence I came: where I lay without all worldly comfort. . . .

[He escaped again; but this time was captured again by the Moors.]

And at the next setting out of the gallies, I was put to my old occupation; where I remained a galley slave for three years and above after [1588-1592.] In which time, I was eight voyages at sea: and at such times as the gallies lay in harbour, I was imprisoned with the rest of the captives, where our ordinary food

was bread and water; and, at some times, as once or twice in a week, a small quantity of sodden wheat.

To conclude, I passed my time in sickness and extreme slavery until, by the help of an honest Merchant [? Master Richard Stapar or Stapers], of this city of London, and having a very fit opportunity by means of certain [of] our English ships which were ready to set sail, bound homeward, upon Christmas Even, being the 24th of December 1592, I came aboard [at Algiers] the *Cherubim* of London; which, weighing anchor, and having a happy gale, arrived in England towards the end of February [1593] following.

### 37. Court-Martial of an English Prisoner-of-War in Spain, A.D. 1626.<sup>1</sup>

#### *The Accused Challenges the Court to Single Combat.*

[The narrator, Peeke, a gentleman of Devonshire, volunteered in a naval expedition sent to capture the port and region of Cadiz, during the war with Spain, in 1625. But the forces that landed were surprised, after their initial victory, captured, and taken to headquarters for trial. Peeke expected harsh treatment, perhaps death; for he had killed several of the enemy, and in that period of religious warfare little mercy was shown. However, he had spared the life of a noble Spanish officer, and this gave ground for hope.]

Then came a command to the Terniente or Governor of Cadiz to have me sent to Sherrys otherwise called Xerez, lying three leagues from Cales [Cadiz].

Wondrously unwilling, could I otherwise have chosen, was I to go to Xerez, because I feared I should then be put to torture. . . . Anon after, away was I conveyed with a strong guard by the Governor of Cadiz and brought to Xerez on a Thursday about twelve at night . . . My day of trial being come, I was

1. From *T. Peeke*, "Three to One, being an English-Spanish Combat performed by a Western Gentleman of Tavistock in Devonshire", in "Stuart Tracts 1603-1693", edited *C. H. Firth*, London, Constable, 1903, p. 275.

brought from prison into the town of Xerez, by two drums [drummers] and a hundred shot [musketeers], before three Dukes, four Condes or Earls, four Marquises; besides other great persons; the town having in it, at least, five thousand soldiers.

At my first appearing before the Lords; my sword lying before them on a table, the Duke of Medina asked me, "if I knew that weapon." It was reached to me. I took it and embraced it with mine arms; and, with tears in mine eyes, kissed the pommel of it. He then demanded, "how many men I had killed with that weapon?" I told him, "If I had killed one, I had not been there now before that princely assembly: for when I had him at my foot, begging for mercy, I gave him life: yet he, then very poorly, did me a mischief." . . . Then said the Duke of Medina to me, "Come on! Englishman! what ship came you in?" I told him "*The Convertine*." "Who was your Captain?" "Captain Portar." "What ordnance carried your ship?" I said "Forty pieces." But the Lords looking all this while on a paper, which they held in their hands; the Duke of Medina said, "In their note, there were but thirty-eight."

In that paper—as after I was informed by my two Irish interpreters—there was set down the number of our ships; their burden, men, munition, victuals, captains, 'c., as perfect as we ourselves had them in England.

"Of what strength," quoth another Duke, "is the fort at Plymouth?" I answered, "Very strong." "What ordinance in it?" "Fifty," said I. "That is not so," said he, "there are but seventeen." "How many soldiers are in the fort?" I answered, "Two hundred." "That is not so," quoth a Conde, "there are but twenty."

The Marquis Alquezezes asked me "Of what strength the little island was before Plymouth?" I told him, "I knew not." "Then," quoth he, "we do."

"Is Plymouth a walled town?" "Yes, my Lords." "And a good wall?" "Yes," said I, "a very good wall." "True," says a Duke, "to leap over with a staff!" "And hath the town," said the Duke of Medina, "strong gates?" "Yes." "But," quoth he,

"there was neither wood nor iron to those gates, but two days before your fleet came away." . . . "How did it chance," said the Duke Giron, that "you did not in all this bravery of the fleet, take Cadiz as you took Punthal?" I replied, "That the Lord General might easily have taken Cadiz, for he had near a thousand scaling ladders to set up, and a thousand men to lose; but he was loth to rob an almshouse, having a better market to go to." "Cadiz," I told them, "was held poor, unmanned and unmunitioned." "What better market?" said Medina. I told him, "Genoa or Lisbon." And as I heard there was instantly, upon this, an army of six thousand soldiers sent to Lisbon.

"Then," quoth one of the Earls, "when thou meetest me in Plymouth, wilt thou bid me welcome?" I modestly told him, "I could wish they would not too hastily come to Plymouth; for they should find it another manner of place, than as now they slighted it."

Many other questions were put to me by these great Dons; which so well as God did enable me I answered. They speaking in Spanish, and their words interpreted to me by those two Irishmen before spoken of; who also related my several answers to the Lords.

And by the common people, who encompassed me round, many jeerings, mockeries, scorns and bitter jests were to my face thrown upon our nation: which I durst not so much as bite my lip against, but with an enforced patient ear stood still, and let them run on in their revilings.

At the length, amongst many other reproaches and spiteful names, one of the Spaniards called Englishmen "Gallinas" (hens). At which the great Lords fell a laughing. Hereupon one of the Dukes, pointing to the Spanish soldiers, bade me note how their King kept them—and indeed they were all wondrously brave in apparel; hats, bands, cuffs, garters, etc.: and some of them in chains of gold—and asked further, "If I thought these would prove such hens as our English; when next year they should come into England?" I said, "No". But being somewhat emboldened by his merry countenance, I told him as merrily, "I thought they would be within one degree of hens." "What meanest thou by that?" said a Conde. I replied, "They would prove pullets or chickens." "Dar-

est thou then," quoth the Duke of Medina, with a brow half angry, "fight with one of these Spanish pullets?"

"O, my Lord!" said I, "I am a prisoner and my life at stake; and therefore dare not to be so bold as to adventure upon any such action. There were here of us English, some fourteen thousand; in which number, there were about twelve thousand better and stouter men than ever I shall be; yet with the license of this princely assembly, I dare hazard the breaking of a rapier," and withal told him, "He is unworthy of the name of an Englishman, that should refuse to fight with one man of any nation whatsoever." Hereupon my shackles were knocked off; and my iron ring and chain taken from my neck.

Room was made for the combatants; rapier and dagger were the weapons. A Spanish champion presented himself, named Signior Tiago: when, after we had played some reasonable good time, I disarmed him, as thus: I caught his rapier betwixt the bars of my poniard and there held it, till I closed with him; and tripping up his heels, I took his weapons out of his hands and delivered them to the Dukes. I could wish that all you, my dear Countrymen! who read this relation had either been there, without danger, to have beheld us: or that he with whom I fought were here in prison, to justify the issue of that combat.

I was then demanded, "If I durst fight against another?" I told them, "My heart was good to adventure; but humbly requested them to give me pardon, if I refused." For to myself I too well knew that the Spaniard is haughty, impatient of the least affront; and when he received but a touch of any dishonour, disgrace or blemish (especially in his own country, and from an Englishman) his revenge is implacable, mortal and bloody.

Yet being by the nobleman pressed again and again, to try my fortune with another; I (seeing my life in the lion's paw, to struggle with whom for safety there was no way but one, and being afraid to displease them) said that "if their Graces and Greatnesses would give me leave to play at mine own country weapon called the quarterstaff, I was then ready there, an opposite against any comer, whom they would call forth: and would willingly lay down my

life before those Princes to do them service; provided my life might by no foul means be taken from me."

Hereupon, the head of an halbert, which went with a screw, was taken off, and the steel [handle] delivered to me; the other butt end of the staff having a short iron pike in it. This was my armour: and in my place I stood, expecting an opponent. At the last, a handsome and well-spirited Spaniard steps forth, with his rapier and poniard. They asked me "What I said to him?" I told them, "I had a sure friend in my hand that never failed me, and therefore made little account of that *one* to play with; and should show them no sport."

Then a second, armed as before, presents himself. I demanded, "If there would come no more?" The Dukes asked, "How many I desired?" I told them, "Any number under six." Which resolution of mine, they smiling at in a kind of scorn; held it not manly, it seemed, not fit for their own honours, and the glory of their nation, to worry one man with a multitude: and therefore appointed three only, so weaponed, to enter the lists . . . . . To die, I thought it most certain; but to die basely, I would not. For three to kill one had been to me no dishonour; to them, weapons considered, no glory. An honourable subjection, I esteemed better than an ignoble conquest. Upon these thoughts I fell to it.

The rapier men traversed their ground; I mine. Dangerous thrusts were put in, and with dangerous hazard avoided. Shouts echoed to heaven to encourage the Spaniards: not a shout nor hand to hearten the poor Englishman. Only heaven I had in mine eye, the honour of my country in my heart, my fame at the stake, my life on a narrow bridge, and death both before and behind me.

It was not now a time to dally. They still made full at me; and I had been a coward to myself, and a villain to my nation, if I had not called up all that weak manhood which was mine to guard my own life, and overthrow my enemies.

Plucking up therefore a good heart, seeing myself faint and weary; I vowed to my soul to do something, ere she departed from me: and so setting all upon one cast, it was my good fortune (it was my God that did it for me), with the butt end, where the iron

pike was, to kill one of the three; and within a few bouts after, to disarm the other two; causing the one of them to fly into the army of soldiers then present, and the other for refuge fled behind the bench. . . .

Now was I in greater danger, being, as I thought, in peace; than before when I was in battle. For a general murmur filled the air, with threatenings at me; the soldiers especially bit their thumbs, and was it possible for me to escape?

Which the noble Duke of Medina-Sidonia seeing, called me to him; and instantly caused proclamation to be made that none, on pain of death, should meddle with me; and by his honourable protection I got off, not only with safety but with money. For by the Dukes and Condes were given me, in gold, to the value of four pounds, ten shillings sterling: and by the Marquis Alquenezes himself, as much; he, embracing me in his arms, and bestowing upon me that long Spanish russet cloak I now wear; which he took from one of his men's backs, and withal furnished me with a clean band and cuffs. It being one of the greatest favours a Spanish Lord can do to a mean man to reward him with some garment as recompense of merit. . . .

After our fight in Xerez, I was kept in the Marquis Alquenezes' house . . . After this, I was sent to the King of Spain, lying at Madrid. My conduct [guard] being four gentlemen of the Marquis Alquenezes'; he allowing unto me in the journey twenty shillings a day when we travelled, and ten shillings a day when we lay still. . . .

Upon Christmas Day, I was presented to the King, the Queen, and Don Carlos the Infante. Being brought before him: I fell, as it was fit, on my knees. Many questions were demanded of me; which, so well as my plain wit directed me, I resolved.

In the end, His Majesty offered me a yearly pension (to a good value) if I would serve him either at land or at sea. For which his royal favours, I (confessing myself infinitely bound and my life indebted to his mercy) most humbly intreated, that with his Princely leave, I might be suffered to return unto mine own country: being a subject only to the King of England, my Sovereign.

And besides that bond of allegiance, there was another obligation due from me to a wife and children: and therefore I most submissively begged that His Majesty would be so Princely minded as to pity my estate, and let me go. To which he, at last, granted; bestowing upon me one hundred pistolets [£25-£150 in present value] to bear my charges . . . And so hoisting sail for England, I landed on the three and twentieth day of April 1626, at Foy in Cornwall.

And thus endeth my Spanish pilgrimage, with thanks to my good God, that in this extraordinary manner preserved me, amidst these desperate dangers.

38. A Blood-Feud Trial in Modern Montenegro.<sup>1</sup>

*Balancing the Blood-Account regardless of Guilt.*

Whenever in the mountains I asked why anything was done, I was told, "Because Lek ordered it." Law, custom, usage, were all attributed to Lek. That he must have been a man of strong personality to have thus set a mark on a people is obvious; but very little is known about him. His Canon was handed down orally to the elders and in their hands has been somewhat modified in different districts, but was in force through all the North Albanian mountains, both Moslem and Christian. Truly "in force," for "Lek said so" obtained more obedience than the Ten Commandments, and the teaching of the hodjas and the priests was often vain if it ran counter to that of Lek.

Who was Lek Dukagin? The Dukagini were chieftains in North Albania, and the few references to them show they ruled wide lands. . . . Lek (Alexander) I was a chieftain who aided the Venetians against the Turks. . . . Though Lek enforced the Canon, it so much resembles tribe law of other lands that we cannot believe he originated it in the fifteenth century. What he evidently strove to do was to check crime by inflicting certain punishments. . . .

1. From *M. Edith Durham*, "Some Tribal Origins, Laws, and Customs of the Balkans", The Macmillan Co., New York, 1929, pp. 64-91, in part; by permission of the publishers.

Murder may be the result of a quarrel or it may be a blood-feud, the cause of which is more or less remote. In either case the man who has taken blood flies at once to a safe place outside the tribe. Any house is bound to give him hospitality. In the case of a feud, he is regarded as a most unfortunate man who has but done his duty. He at once proclaims his deed. The headmen of his tribe then meet and order his house to be burnt. Among the Dukagini the council has power also to destroy his crops, cut down his fruit trees, slaughter his beasts, and condemn the land to lie unworked for a term of years. An incredible amount of food-stuff is thus wasted. In this group not only the man who has taken blood, but all the males of his "house," are liable for blood, so they, too, have to fly. The "house" is the home maybe of a whole family community—forty people. But the law is carried out to the last letter. Such desolated spots have I seen. But "It is the Canon, so must be obeyed," was the answer to any remonstrance I made.

Feuds being very weakening to a tribe, the headmen of the tribe or friends of the family would attempt to stop the feud. . . . The peace-making is preceded by the "gjaksur" (he who owes blood) sending some friends to the "zoti i gjakut" (lord of blood) to ask for "besa" (promise of truce). This may be granted and further prolonged, and during the truce the gjaksur and his relatives are safe. To end the feud, "me paitue gjak" (pacify the blood), twenty-four con-jurors are needed to swear the peace oath with the gjaksur. The plaintiff (lord of blood) has the right to name them. Or they may be named by the "bairaktar" (head of the tribe). This is only done if the matter cannot be settled by con-jurors chosen by the plaintiff.

The gjaksur has the right to object to two of the con-jurors, who must be replaced by others. The con-jurors are all men of standing in the tribe ("plect," elders; "kren," heads). They examine the facts and hear the accused ("gjaksur") and decide if peace can be made and on what terms. If all twenty-four agree to take the peace oath with him, he is then reckoned innocent, and he and his family do not owe any further blood, but pay blood-gelt to the

zoti i gjakut. This varied from about £25 to £50. If they all agree but one, he may be replaced by two others. If still no agreement is come to, the gjaksur may bring more con-jurors, who are members of his family, up to the number of eight.

Agreement having been come to, the whole party goes into the church (or mosque) before which the council has been held. In the church the candles are lighted on the altar, and in the presence of the priest the gjaksur swears his innocence. He no longer owes blood, and is, therefore, innocent. Next swear those of his family who may have been summoned, and then all the con-jurors. After this the gjaksur and the zoti i gjakut frequently ratify the peace by swearing blood brotherhood. . . .

In Montenegro the judgment given by the elders was known familiarly as Sud Dobrih Ljudi, the judgment of the Good Men. Vuk Vrchevitch gives many actual cases. The object of almost all is either to stop a blood-feud or to prevent a quarrel developing into one; in fact, to establish peace by satisfying both parties. "An ill thing would it be," says one of the elders, "if one party to a trial went home singing and the other lamenting." In every case of "blood" quoted by him twenty-four elders are required, as by the law of Lek Dukagin. . . .

The ceremony by which a blood-feud is stopped is described in detail. The following is a literal but somewhat condensed translation of a deposition made by a peasant in 1851:—

"Two years ago we celebrated the 'Karitad' (funeral feast) of the deceased Knezh Dumo. The whole village flocked to it and ate and drank all they could; and all at once two little boys started fighting like two cocks, and one of our 'odivas' (married women) rushed to protect her child, and the mother of the other one rushed up and hit her on the head with a stone. Down ran the blood, and both women began to shout awful accusations about each other's families. All our men rushed with weapons in their hands to protect their sister. The men of the other bratstvo [clan] rushed to protect theirs, and there was a terrible fight. We killed two of them and wounded two, and the woman who had started all the trouble was wounded also. My father was killed and I was badly

wounded, and had the villagers not intervened there would have been a blood-bath. We buried the death and carried home the wounded. Then the other bratstvo threatened me and my bratstvo about the two killed; and they owed us for one dead head and two wounded.

"In a few days the village gathered and wanted us to make peace. We sent men to them and asked for the first truce till St. Dmitri's Day (October 26th); and so soon as it came we asked for a second till Christmas, which they granted after much begging. At Christmas we asked, as is the custom, for both truce and arbitration ('kmetstvo')." [If a third truce were granted this meant that arbitration would be accepted. If a third truce were refused the feud raged as badly as ever.] "We fixed it for St. Sava's Day (January 14th). They gave us the names of twenty-four men, and off went I over wood and rock to beg them to come, and luckily none refused. St. Sava's Day came. I killed two oxen and six sheep, took four hams and bought two barrels of wine. I gathered together my bratstvo, my Kums, and my pobratims (sworn brothers), and, God forgive me, they helped me with money and bread, and so I had all that was needed. And the men sat down and gave judgment thus:

"They held the head of Nikola Perova as equivalent to that of my dead father. The head of Gjuro Trpkov they valued at 120 zecchins. One of their wounded was held equivalent to my wounds and the other was valued as seven 'bloods' (one 'blood' was 10 zecchins, i. e. about £5; the judges valued the wounds by this standard), and that woman's wound was reckoned as three bloods. And they decreed that I should bring six infants (in order that a man of the other bratstvo shall stand godfather to them and thus cement peace by a spiritual relationship), and that I should hang the gun which fired the fatal shot round my neck and go on all fours for forty or fifty paces to the brother of the deceased Nikola Perova. I hung the gun to my neck and began to crawl towards him, crying: 'Take it, O Kum, in the name of God and St. John.' I had not gone ten paces when all the people jumped up and took off their caps and cried out as I did. And by God, though I had killed his brother, my humiliation horrified him, and his face flamed

when so many people held their caps in their hands. He ran up and took the gun from my neck. He took me by my pigtail ('percin') and raised me to my feet, and as he kissed me the tears ran down his face, and he said: 'Happy be our Kumstvo (Godfatherhood).' And when we had kissed I, too, wept and said: 'May our friends rejoice and our foes envy us.' And all the people thanked him. Then our married women carried up the six infants, and he kissed each of the six who were to be christened.

"Then all came to us and sat down to a full table." (They were waited on by the head of the house and his men, who do not sit down with the elders and the plaintiff. At the head of the table sits the most respected of the elders. After the meal he proposes the health of the new Kum and of the master of the house, and they drink to the newly established peace. The payment of the fine is then called for.) "'By God, my brother,' said my uncle, 'we have but little money. But we are a fine bunch of brethren, each with shining weapons. Here they are and here are you. Another time we shall do to you as you do to us. Here are the weapons. Take what your honour permits you.' Kum Nikola was indeed a man. He took the gun which had shot his brother and kissed it on the muzzle. The other weapons he gave back, saying: 'Take them, O Kum. I give them you as gift in return for the six Godfatherhoods; and I give you my brother for the gun.'"

The company then parted. The six children were christened and everyone went home.

The verdict shows clearly that the whole object is to balance the blood account. The question of who is guilty of starting the fray does not appear. The woman who threw the stone and drew first blood is not punished. On the contrary, her bratstvo is awarded compensation for her wound. The injured bratstvo, that is, the one first attacked, is the one which appears as the guilty one, and is condemned to pay blood-gelt. That the fine is not enforced is due to the clemency of the other party. . . .

These examples show how closely the procedure in the Bocche di Cattaro and Montenegro resembled that of the still extant Canon of Lek. The number of con-jurors and the subservience of all to the blood-customs are alike.



### 39. Summary Justice on a Foreigner in Madrid, A.D. 1839.<sup>1</sup>

#### *A Bible-Peddler has a bold verbal Bout with a Magistrate.*

[The narrator,—that strange genius, poet and horse-tamer, philologist and snake-charmer, stylist and blacksmith, dreamer and pugilist, missionary and gypsy-lover—spent some years in Spain devotedly peddling Bibles. Since at that period the Carlist rebellion made the Government alert for suspicious characters, and since Catholicism was the State religion, and since Borrow was indefatigable and unafraid, he came often into collision with the authorities. He had once spent three weeks in jail in Madrid rather than yield to what he deemed an unwarrantable prosecution.

He was now in Madrid again, distributing his Bibles, when once more the local authorities sought to repress his objectionable doings:]

On a certain night I had retired to rest rather more early than usual, being slightly indisposed. I soon fell asleep, and had continued so for some hours when I was suddenly aroused by the opening of the door of the small apartment in which I lay. I started up, and beheld Maria Diaz, with a lamp in her hand, enter the room. I observed that her features, which were in general peculiarly calm and placid, wore a somewhat startled expression. "What is the hour, and what brings you here?" I demanded.

"Señor," said she, closing the door, and coming up to the bedside, "it is close upon midnight; but a messenger belonging to the police has just entered the house, and demanded to see you. I told him that it was impossible, for that your worship was in bed. Whereupon he sneezed in my face, and said that he would see you if you were in your coffin. He has all the look of a goblin, and has thrown me into a tremor. I am far from being a timid person, as you are aware, Don Jorge; but I confess that I never cast my eyes on these wretches of the police but my heart dies away within me! I know them but too well, and what they are capable of."

"Pooh," said I, "be under no apprehension; let him come in, I fear him not, whether he be alguazil [bailiff] or hobgoblin. Stand, however, at the doorway, that you may be a witness of what takes place, as it is more than probable that he comes at this unseasonable hour to create a disturbance, that he may have an opportunity of making an unfavourable report to his principals, like the fellow on the former occasion."

The hostess left the apartment, and I heard her say a word or two to some one in the passage, whereupon there was a loud sneeze, and in a moment after a singular figure appeared at the doorway. It was that of a very old man, with long, white hair, which escaped from beneath the eaves of an exceedingly high-peaked hat. He stooped considerably, and moved along with a shambling gait. I could not see much of his face, which, as the landlady stood behind him with the lamp, was consequently in deep shadow. I could observe, however, that his eyes sparkled like those of a ferret. He advanced to the foot of the bed, in which I was still lying, wondering what this strange visit could mean; and there he stood gazing at me for a minute at least, without uttering a syllable. Suddenly, however, he protruded a spare skinny hand from the cloak in which it had hitherto been enveloped, and pointed with a short staff, tipped with metal, in the direction of my face, as if he were commencing an exorcism. He appeared to be about to speak, but his words, if he intended any, were stifled in their birth by a sudden sternutation which escaped him, and which was so violent that the hostess started back, exclaiming, "Ave Maria purisima!" and nearly dropped the lamp in her alarm.

"My good person," said I, "what do you mean by this foolish hobgoblinry? If you have anything to communicate, do so at once, and go about your business. I am unwell, and you are depriving me of my repose."

"By the virtue of this staff," said the old man, "and the authority which it gives me to do and say that which is convenient, I do command, order, and summon you to appear to-morrow, at the eleventh hour, at the office of my lord the Corregidor [magistrate] of this village of Madrid, in order that, standing before him humbly, and

<sup>1</sup> From *George Borrow*, "The Bible in Spain", London, Norwich ed., Constable & Co., 1923, vol. II, p. 254 (New York, Gabriel Wells).

with befitting reverence, you may listen to whatever he may have to say, or, if necessary, may yield yourself up to receive the castigation of any crimes which you may have committed, whether trivial or enormous. *Tenez, compère,*" he added, in most villainous French, "*voilà mon affaire; voilà ce que je viens vous dire.*"

Thereupon he glared at me for a moment, nodded his head twice, and, replacing his staff beneath his cloak, shambled out of the room, and with a valedictory sneeze in the passage left the house. \* \* \*

Precisely at eleven on the following day I attended at the office of the Corregidor. I was not kept waiting a moment, but, as soon as I had announced myself, was forthwith ushered into the presence of the Corregidor—a good-looking, portly, and well-dressed personage, seemingly about fifty. He was writing at a desk when I entered, but almost immediately arose and came towards me. He looked me full in the face, and I, nothing abashed, kept my eyes fixed upon his. He had, perhaps, expected a less independent bearing, and that I should have quaked and crouched before him; but now, conceiving himself bearded in his own den, his old Spanish heaven was forthwith stirred up. He plucked his whiskers fiercely. "Escuchad" [listen], said he, casting upon me a ferocious glance, "I wish to ask you a question."

"Before I answer any question of your excellency," said I, "I shall take the liberty of putting one myself. What law or reason is there that I, a peaceable individual and a foreigner, should have my rest disturbed by *duendes* [ghosts] and hobgoblins sent at midnight to summon me to appear at public offices like a criminal?"

"*Usted falta a la verdad*" [You don't speak the truth] shouted the Corregidor; "the person sent to summon you was neither *duende* nor hobgoblin, but one of the most ancient and respectable officers of this casa; and so far from being despatched at midnight, it wanted twenty-five minutes to that hour by my own watch when he left this office, and as your lodging is not distant, he must have arrived there at least ten minutes before midnight; so that you are by no means accurate, and are found wanting in regard to truth."

"A distinction without a difference," I replied. "For my own part, if I am to be disturbed in my sleep, it is of little consequence

whether at midnight or ten minutes before that time; and with respect to your messenger, although he might not be a hobgoblin, he had all the appearance of one, and assuredly answered the purpose, by frightening the woman of the house almost into fits by his hideous grimaces and sneezing convulsions."

Corregidor.—You are a—*yo no se que*. Do you know that I have the power to imprison you?

Myself.—You have twenty alguazils [bailiffs] at your beck and call, and have of course the power, and so had your predecessor, who nearly lost his situation by imprisoning me; but you know full well that you have not the right, as I am not under your jurisdiction, but that of the Captain-General. If I have obeyed your summons, it was simply because I had a curiosity to know what you wanted with me, and from no other motive whatever. As for imprisoning me, I beg leave to assure you that you have my full consent to do so; the most polite society in Madrid is to be found in the prison, and as I am at present compiling a vocabulary of the language of the Madrilenian thieves, I should have, in being imprisoned, an excellent opportunity of completing it. There is much to be learnt even in the prison, for, as the gypsies say, "The dog that trots about finds a bone."

Corregidor.—Your words are not those of a *caballero*. Do you forget where you are, and in whose presence? Is this a fitting place to talk of thieves and gypsies in?

Myself.—Really I know of no place more fitting, unless it be the prison. But we are wasting time, and I am anxious to know for what I have been summoned; whether for crimes trivial or enormous, as the messenger said.

It was a long time before I could obtain the required information from the incensed Corregidor; at last, however, it came. . . .

[It turned out that Borrow's assistant had by mistake taken possession of a box of Testaments which had been impounded by the Magistrate.] I then told him frankly that I was entirely ignorant of the circumstance by which he had felt himself aggrieved; but that if, upon inquiry, I found that the chest had actually been re-

moved by my servant from the office to which it had been forwarded, I would cause it forthwith to be restored, although it was my own property.

He looked at me for a moment, as if in doubt of my sincerity, then, again plucking his whiskers, he forthwith proceeded to attack me in another quarter: "*Pero que infamia, que picardia!* to come into Spain for the purpose of overturning the religion of the country. What would you say if the Spaniards were to go to England and attempt to overturn the Lutheranism established there?"

"They would be most heartily welcome," I replied; "more especially if they would attempt to do so by circulating the Bible, the book of Christians, even as the English are doing in Spain. But your excellency is not perhaps aware that the Pope has a fair field and fair play in England, and is permitted to make as many converts from Lutheranism every day in the week as are disposed to go over to him. . . ."

On my repeating my promise that the books and chest should be forthwith restored, the Corregidor declared himself satisfied, and all of a sudden became excessively polite and condescending: he even went so far as to say that he left it entirely with myself whether to return the books or not; "and," continued he, "before you go, I wish to tell you that my private opinion is, that it is highly advisable in all countries to allow full and perfect tolerance in religious matters, and to permit every religious system to stand or fall according to its own merits."

Such were the concluding words of the Corregidor of Madrid, which, whether they expressed his private opinion or not, were certainly grounded on sense and reason.<sup>2</sup> I saluted him respectfully

2. In contrast to the liberal views of the Spanish judge in 1839 is the action taken by the Spanish government just a hundred years later, as reported in the following dispatch:

"Special Correspondence, The New York Times.

"London, Sept. 23, 1940.—Reports reaching here say the Spanish Government has just confiscated 110,000 copies of the Bible, the Evangelists and excerpts from the Scriptures which the British and Foreign Bible Society had sent to Spain for distribution. According to information here, the books are to be ground up to make cellulose, one of the materials most lacking in Spain.

and retired, and forthwith performed my promise with regard to the books; and thus terminated this affair.

"Upon what grounds the government acted is not clear. It is learned that as soon as the civil war was over, representatives of the society approached officials of the Ministry of Propaganda, explaining that they wished to resume distributing the tracts and desired to comply fully with the censorship regulations. No objection was raised, and accordingly the 110,000 copies were sent out from England. They included versions of the Scriptures not only in Castilian, but in numerous other languages.

"Last June, before there had been an opportunity to begin the work of distribution, government propaganda officials called upon the society for an explanation of its purposes. In August the books were all confiscated. Thus far it has not been possible to have the case reconsidered, although as far as is known here, the books have not yet been destroyed.

"In the sixty-two years that it has worked in Spain, the society's representatives have been through several civil wars, but never before has it encountered such drastic treatment. More than 19,000,000 copies of the Bible or parts of the Scriptures have been distributed during that time, and even in 1937 and 1938, midway in the civil war, 40,000 copies were distributed yearly.

"Conditions in Spain, it is said here, more nearly resemble those in 1835 and the years following, when George Borrow went out to represent the society and had the adventures he described in 'The Bible in Spain.' Then, however, despite the determined opposition of the Catholic Church, Mr. Borrow was able to publish a Spanish translation of the Bible and to distribute it not only in Madrid but throughout the country."—ED.

*Part II. ASIA*

*Chapter 9*

*ARABIA*

## ARABIA

## Introductory.

[When Mohammed (A. D. 570–632) proclaimed at Mecca and Medina the new religion of Islam (meaning “submission to God”), in revolution against the pantheism of early Arabia, he founded also the beginnings of a legal system. By a century after his death the domains of the conquering Arabs, carrying with them their religion and law, had spread from Bagdad east and west to India and Persia and to Spain and Morocco. By the 900s A. D. the legal system was full-fledged, in copious literature, and has remained one of the three great legal systems of the world.<sup>1</sup> Illustrations of its administration of justice in its developed form will be found in Chap. 15 (Turkey), Nos. 68, 69, and in Chap. 18 (Tunis), No. 88.

But, as it spread farther and farther, it adapted itself to its local environment, much as the Anglican legal system adapted itself in the United States, in Canada, and in Australia. It allowed local instincts and habits to retain their individuality, in varying degree, but especially in the local methods of administration of justice.

In Arabia, its original home, the Islamic law (known in Arabic as the “Shari’a”) generally controlled in matters of property and domestic relations. But the modes of trial have remained more or less unaltered to the present day; for the vigorous but unchanging Beduin Arab stock of the desert still retains in large degree its traits of collective clan-responsibility, its respect for the solemn religious oath, and its liking for procedural simplicity.

In the following passages, the first illustrates Mohammed’s status as the leader of his tribe in law as well as in religion. The second one illustrates the traditional freedom of method of a medieval magistrate in the Orient. The remaining seven passages exhibit the variant process of doing justice in modern times in the different

1. For a full account of the Islamic legal system, see Chap. 9 of the present writer’s “Panorama of the World’s Legal Systems”.

## Chapter 9

40. *The Justice of Mohammed, A. D. 630.*
  - (1) *The Impartial Judge.*
  - (2) *The Wife accused of Adultery.*
  - (3) *The Tribe accused of Murder.*
41. *The Justice of the Khalifs in Bagdad’s Palmy Days, A. D. 740.*  
*The Case of the Loyal Lover who Falsely Confessed himself a Thief.*
42. *The Oath Ordeal to Discover a Murderer, in Modern Mesopotamia.*  
*Swearing on the Tomb of a Saint.*
43. *Speedy Justice in the Kingdom of Ibn Saud.*  
*A Sheriff’s Posse of 400 scours the Desert for Camel Thieves.*
44. *A Day in Court in Modern Mecca.*  
*Conciliation is better than Litigation.*
45. *Judicial Procedure in the Yaman Capital.*  
*The Imam holds Court daily, under the Tree of Justice.*
46. *Tribal Justice in the Yaman Desert.*  
*A Youthful Killer voluntarily seeks Trial.*
47. *Justice among the Bedouin of Egypt.*  
*A Morning Session of the Sheikh’s Court, and the Ordeal of the Red Hot Spoon.*
48. *Bedouin Justice in the Sinai Desert.*  
*The Accused is personally Absolved; but the Tribe must Undergo the Ordeal of the Red Hot Spoon.*

Arabian regions,—in the Yaman desert at the South, in Saudia at the center, in Mesopotamia and the Sinai desert at the north, and across the Red Sea in Egypt.]

#### 40. The Justice of Mohammed, A.D. 630.<sup>1</sup>

[Mohammed (A. D. 570–632), as chief of his tribe and later the inspired prophet of God for the Islamic world, acted as supreme judge in all controversies among the faithful. From his decisions and other sayings clever jurists gradually built up, by deduction and expansion, the entire body of principles of Islamic law. His authenticated sayings (some 7000 in all), carried meanwhile in loyal tradition, were in the 800s gathered into two great manuscript collections; the one principally used being that of El Bokhari.

The following anecdotes of Mohammed's justice are taken from translations of El Bokhari.]

##### (1) *The Impartial Judge.*

A woman belonging to the tribe of Makhzum was found guilty of theft; and her relations requested Usama-bin-Zaid, for whom the Prophet had much regard, to intervene and entreat the Prophet to release her. But the Prophet said, "O Usama, do you mean to come to me and intercede against the laws of God?" Then the Prophet convened a meeting, and thus addressed them: "Nations which have preceded you have been wiped off the face of the earth, for the one reason only, that they imposed punishment upon the poor and relaxed the laws in favor of the rich. I swear by God that if Fatima my daughter were to be found guilty of theft, then I would have her hand cut off".<sup>2</sup>

1. The first of these passages is from the translation in *Kwaja Kamal-ud-Din*, "The Ideal Prophet", Islamic Review Office, Woking, 1925, p. 176, of the anecdote reported by El Bokhari, *infra*, in vol. 4, p. 379, tit. LXXXVI, chap. XII.

The second and the third passages are from *El-Bokhari*, "Les Traditions Islamiques", translated in French by O. Houdas, Paris, Ernest Leroux, 1908, 1914, tit. LXV, Chap. III, vol. 3, p. 390; tit. LXXXVII, Chap. XXII, vol. 4, p. 414.

2. The loss of the right hand was the regularly imposed penalty for theft in Islamic law, and is still in vogue.

(2) *The Wife accused of Adultery.* Hilal, son of Omayya, came to the Prophet accusing his wife of adultery with Sharik, son of Salma. "You must prove your accusation", said the Prophet, "or you will receive a flogging [as the prescribed punishment for slander of a woman's chastity]". "O Prophet of God", replied Hilal, "when a husband sees with his own eyes his wife with another man, does he have to go and hunt up witnesses?" The Prophet again told him that he must prove his accusation, or else he would receive a flogging. Then cried Hilal, "I swear, by Him who has imposed on you the duty of seeking truth, that I am asserting what is a fact. May God reveal the truth to you and save my back from a flogging!"

Then the angel Gabriel transmitted to the Prophet a revelation [The Koran, chap. XXIV, verses 6–8]: "They who accuse their wives of adultery but have no witnesses other than themselves shall be required to make oath four times by God that they speak truth, and at the fifth time to invoke the wrath of God upon themselves, if they be liars. And as for the wife, it shall avert punishment from her if she make oath four times by God that her husband lies, and at the fifth time if she invoke the wrath of God upon herself if the husband speaks truth"].

So the Prophet sent for the wife. Then Hilal came forward and made his four oaths.

"God knows", said the Prophet, "that one of you two is lying. Will neither of you admit your falsity?"

Then the woman came forward and made her four oaths. But when she was on the point of making her fifth oath, they reminded her that she would be punished [by God] if she had lied, and thereupon she hesitated and seemed at the verge of recanting her assertion. Yet she proceeded, and finished the curse-oath, saying, "I will not bring everlasting dishonor upon my family".

"Now", said the Prophet, "the woman has sworn herself free; but keep a watch on her. If she bears a babe with black eyes, big buttocks, and fat legs, it will be the child of Sharik". And when the child came, it had just those features!

(3) *The Tribe accused of Murder.* The Khalif Omar, holding public audience one day on his throne without the palace, said to those present, "What is your opinion of the rule that an oath sworn by fifty men [accusing another tribe] justifies the application of the right of retaliation?" "The fifty oaths require retaliation", they replied; "such has always been the custom". "And what is your opinion?", said the Khalif, addressing particularly Abu Kilaba. "O Prince of the Faithful", replied he, "you see before you Arabs of high rank and commanders of armies. Now if fifty of them should come and make oath, without having seen the deed, that a certain married man of Damascus has committed adultery, would you thereon command that the man be stoned to death?" "No", replied the Khalif. "And if" said Kilaba "fifty of them should come and testify, without having seen the deed, that a certain man of Emesus had stolen something, would you thereon command that his hand be cut off?" "No", again replied the Khalif. . . .

"Then", continued Abu Kilaba, "let me relate to you this anecdote showing the rule laid down by the Prophet of God": A company from the Ansar tribe had come to the Prophet and were conversing with him. One of them departed elsewhere [to a place called Khaibar, inhabited by Jews], and was found killed, when his comrades rejoined him. So they returned straightway to the Prophet of God and said: "O Prophet of God, our comrade, who was here among us talking but went away before we left, has just been found by us lying dead in his blood." The Prophet of God said to them, "Whom do you suspect? Or whom do you believe to have slain him?" "We cannot think of any but those Jews who could have killed him", they replied. So the Prophet sent for the Jews, and said to them, "Was it you who killed him?" "No", they answered. Then, addressing the believers, he said, "Would you accept the oath of fifty Jews swearing that they did not kill him?" "No", they replied, "for the Jews would not hesitate, if they had killed him, to make oath that they were innocent". "Well, then", continued the Prophet, "would you yourselves undertake that fifty of you make oath that the Jews killed him, so that you could have

the right of retaliation?" "No", they replied, "we would not dare to make that oath".

So that ended the accusation, and the Prophet paid to the Ansars the amount of the man's life-price out of his own funds.

#### 41. The Justice of the Khalifs in Bagdad's Palmy Days, A.D. 740.<sup>1</sup>

##### *The Case of the Loyal Lover who Falsely Confessed himself a Thief.*

[In all the Asiatic kingdoms, from Arabia to Japan, it was the Ruler's pride to allow easy access of all complainants to his personal justice, and his local Governors emulated him in this, as several anecdotes in various of the present chapters bear witness, even in modern times. In the palmy days of the khalifs Mansur and Harun, at Bagdad, many tales of the Arabian Nights illustrate this.

Those tales were but fictional. Yet many of them were founded on fact; and in general (says an eminent historian, quoted in Gabriel Andisio's "Harun al Rashid", 1931, p. 71), "at each step into Asia we discover more and more clearly that the most exact, complete, and trustworthy accounts of the kingdoms in this part of the world are found in the Thousand and One Nights".

The present narrative is particularly interesting because it runs on parallel lines with the narratives from China (chap. 10) and Japan (chap. 13), in portraying the ideal wise trial judge of the Orient, who by intuition discriminates the innocent from the guilty and resorts to original procedural expedients to elucidate the truth and edify the multitude.

In this case, as universally in Islamic regions for a thousand years past, the penalty for thievery was the loss of the thief's right hand.]

When Khalid ibn Abdallagh al-Kasri was Emir of Bassorah [A.D. 723-741] there came to him one day a company of men dragging

1. From "The Book of the Thousand Nights and a Night", translated by Richard F. Burton, Benares edition of 1885, reprint by the Burton Society of Denver, Colorado, 1900, vol. IV, p. 155.

a youth of exceeding beauty and lofty bearing and perfumed attire; whose aspect expressed good breeding, abundant wit, and dignity of the gravest. They brought him before the Governor, who asked what it was about, and they replied, "This fellow is a thief, whom we caught last night in our dwelling-house." Whereupon Khalid looked at him and was pleased with his well-favouredness and elegant aspect; so he said to the others, "Loose him," and going up to the young man, asked what he had to say for himself. He replied, "Verily the folk have spoken truly, and the case is as they have said." . . . So Khalid was silent awhile considering the matter; then he bade the young man draw near him and said, "Verily, thy confession before witnesses perplexeth me, for I cannot believe thee to be a thief: haply thou hast some story that is other than one of theft; and if so tell it me." Replied the youth, "O Emir, imagine naught other than what I have confessed to in thy presence; for I have no tale to tell save that verily I entered these folks' house and stole what I could lay hands on, and they caught me and took the stuff from me and carried me before thee."

Then Khalid bade clap him in gaol and commanded a crier to cry throughout Bassorah, "O yes! O yes! Whoso be minded to look upon the punishment of such an one, the thief, and the cutting-off of his hand, let him be present tomorrow morning at such a place!"

Now when the young man found himself in prison, with irons on his feet, he sighed heavily and with tears streaming from his eyes extemporised these couplets:—

When Khalid menaced off to strike my hand, If I refuse to tell  
him of her case;  
Quoth I, "Far, far fro' me that I should tell, A love, which ever  
shall my heart engrace;  
Loss of my hand for sin I have confessed, To me were easier than  
to shame her face."

The warders heard him and went and told Khalid, who, when it was dark night, sent for the youth and conversed with him. He found him clever and well-bred, intelligent, lively and a pleasant

companion; so he ordered him food and he ate. Then, after an hour's talk, said Khalid, "I know indeed thou hast a story to tell that is no thief's; so when the Kadi shall come to-morrow morning and shall question thee about this robbery, do thou deny the charge of theft and avouch what may avert the pain and penalty of cutting off thy hand; for the Apostle (whom Allah bless and keep!) saith: 'In cases of doubt, eschew punishment.' Then he sent him back to prison . . . where he passed the night.

And when morning dawned, the folk assembled to see his hand cut off, nor was there a soul in Bassorah, man or woman, but was present to look upon the punishment of that handsome youth. Then Khalid mounted the dais in company of the notables of the city and others; and, summoning all four Kadis [of the four Islamic sects of law], sent for the young man, who came hobbling and stumbling in his fetters. There was none saw him but wept over him and the women all lifted up their voices in lamentation as for the dead. Then the Kadi bade silence the women and said to the prisoner, "These folk avouch that thou didst enter their dwelling-house and steal their goods; belike thou stolest less than a quarter dinar" [the minimum sum requiring loss of the hand]. Replied he, "Nay, I stole that and more." "Peradventure," rejoined the Kadi, "thou art partner with these folk in some of the goods?" Quoth the young man; "Not so; it was all theirs, and I had no right in it." At this the Khalid was wroth and rose and smote him on the face with his whip, applying to his own case this couplet:—

Man wills his wish to him accorded be; But Allah naught accords  
save what He wills.

Then he called for the butcher to do the work, who came and drew forth his knife and taking the prisoner's hand set the blade to it.

When, behold, a damsel pressed through the crowd of women clad in tattered clothes, and cried out and threw herself on the young man. Then she unveiled and showed a face like the moon; whereupon the people raised a mighty clamour, and there was like to have been a riot amongst them and a violent scene. But she



cried out her loudest, saying, "I conjure thee, by Allah, O Emir, hasten not to cut off this man's hand, till thou have read what is in this scroll!" So saying, she gave him a scroll, and Khalid took it and opened it and read therein these couplets: . . .

"He hath avowed a deed he never did, the while, Deeming this better than disgrace of lover lief:

Bear then, I pray, with this distracted lover mine, Whose noble nature falsely calls himself a thief!"

When Khalid had read these lines he withdrew himself from the people and summoned the girl and questioned her; and she told him that the young man was her lover and she his mistress; and that thinking to visit her he came to the dwelling of her people and threw a stone into the house, to warn her of his coming. Her father and brothers heard the noise of the stone and sallied out on him; but he, hearing them coming, caught up all the household stuff and made himself appear a robber to cover his mistress's honour. "Now when they saw him, they seized him (continued she), crying: A thief! and brought him before thee, whereupon he confessed to the robbery and persisted in his confession, that he might spare me disgrace; and this he did, making himself a thief, of the exceeding nobility and generosity of his nature." Khalid answered, "He is indeed worthy to have his desire;" and, calling the young man to him, kissed him between the eyes.

Then he sent for the girl's father and bespoke him, saying, "O Shaykh, we thought to carry out the law of mutilation in the case of this young man; but Allah (to whom be Honour and Glory!) hath preserved us from this, and I now adjudge him the sum of ten thousand dirhams, for that he would have given his hand for the preservation of thine honour and that of thy daughter and for the sparing of shame to you both. Moreover, I adjudge other ten thousand dirhams to thy daughter, for that she made known to me the truth of the case; and I ask thy leave to marry her to him." Rejoined the old man, "O Emir, thou hast my consent." So Khalid praised Allah and thanked Him and improved the occasion by preaching a goodly sermon and a prayerful.

## 42. The Oath Ordeal to Discover a Murderer, in Modern Mesopotamia.<sup>1</sup>

### *Swearing on the Tomb of a Saint.*

[The narrator is an Englishman who conceals his identity under the name Fulanain (meaning in Arabic, "Somebody or other"). After some years of sympathetic observation among the Arab tribes of Mesopotamia—that historically ages-old region of Irak lying between the lower reaches of the great Euphrates and Tigris rivers—he now chronicles, in a series of episodes, the life of the two great tribal confederations there domiciled. Though the region includes pastoral desert, cultivated fields, and boundless navigable marshes, the principal figure in his narratives is one of the marsh-dwellers, Haji Rikkan.]

There are certain holy shrines which the superstition or faith of generations has credited with such powers that no Arab will swear a false oath by them; of these the tomb of 'Ali al Sharji is one. . . . As our slow craft drew away from the Tomb, the boatman made a remark which I did not catch. From the heated tone of Haji Rikkan's reply I gathered that some doubt had been cast on the power of the holy man, dead these many hundreds of years, to slay those who perjured themselves at his tomb.

Leaving the Sunni boatman to his own impious thoughts, Haji Rikkan moved nearer to me, and with more than his usual earnestness defended the saint whose tomb he would reverently kiss on the morrow, seeing no incongruity in the crude prints and mildewed mirrors and broken clocks which adorn its walls. To his simple faith the power of 'Ali al Sharji to strike the false swearer with instant death was indubitable; it was a fact well-known, so widely accepted, that no tribesman, whatever he had at stake, would perjure himself at the shrine. A story of which he could vouch for the truth, the Haji said earnestly, would show how great was 'Ali's reputation as one swift to punish perjury. He himself had seen a robber brought to book and his theft recovered by no other agency

1. From *Fulanain*, "The Marsh Arab: Haji Rikkan", Philadelphia, J. B. Lippincott Co., 1928, p. 90.

than the mere name of 'Ali. The story—so anxious was Haji Rikkan to omit no detail which might lend weight to his defence of the saint—became a long one, too long to be retold in his own words:

On one of his periodical visits to the little town at which he disposed of his surplus rice, Haji Rikkan became the guest for the night of a brother (and a more authentic) Haji,—Sa'd, headman of a neighbouring village. Early in the morning his sleep was broken by the sound of angry voices; accusations of theft and indignant denials ended in an acrimonious wrangle, of which Haji Rikkan soon learned the cause. Some days earlier a townsman of Basrah, Ja'far by name, had come to Haji Sa'd's village to buy buffaloes. Each night he had slept with his four hundred gold liras under his pillow, and now he had waked to find in place of the bag of gold a clod of earth.

Unable to obtain satisfaction from the headman, Ja'far had left the village threatening to lodge a complaint against him with the governor of the district; and the threat was not an empty one, for a few days later Haji Sa'd was arrested and brought into headquarters, where he was informed by the Qaimmaqam that, as he was responsible for what occurred in his village, he must refund to the Basrawi the money stolen from him.

Haji Sa'd protested vigorously against this award.

"Is this justice?" he cried. "I am a true servant of the government, every order given by it is upon my head; but how can I, a poor man, pay so large a sum? Disgrace enough has come upon me by the robbing of my guest, as thine Honour knoweth. Had this Ja'far but entrusted his wealth to me, as our custom is, all would have been well; yet because he failed to do this, I must be ruined. O Excellency the Qaimmaqam, dost give credence to every story brought by lying tongues? Doubtless this townsman gambled away the money in the coffee-shops, and spread his tale of robbery to save himself from the master who entrusted it to him."

Haji Sa'd's words were not without effect. He was allowed to return to his village pending the result of an official search for the thief. The headman, anxious to give what help he could, sent out

some of his tribesmen to pick up the gossip of the country-side; but all they were able to elicit was the fact that a certain Daghar, a man of doubtful reputation of the Matafar tribe, had been seen near the village on the day before the theft. Even this man was said by some witnesses to have since died, and by some to have crossed into Persia, while according to others he had never been born.

No clue having been found by the police, this was all the Qaimmaqam had to go upon; but he resolved to make the most of it by applying a test of which long experience in the district had shown him the efficacy. He called in the headmen of the Matafar Tribe, and in the presence of Haji Sa'd and his witnesses, among whom was Haji Rikkan, delivered his ultimatum.

"One Daghar son of Makki, of your tribe," he said, "has stolen four hundred liras from the village of Haji Sa'd."

"*W'Allah wa b'illah wa t'illah*, I know naught of it," swore one, and the other, "A curse upon me if I am even acquainted with this Daghar!"

"Listen," said the Qaimmaqam, "Either you will swear at the tomb of 'Ali al Sharji that what you say is true, or one of you must remain in prison until the thief and the money are brought."

Silence followed his words. At last, with downcast looks, one of the headmen spoke.

"We cannot swear. We are afraid."

"Stay in prison, thou," answered the Qaimmaqam, "while this other returns to bring the money."

"Let me stay in his stead," the second headman put in.

"Why?"

"Because Daghar is my cousin, and on my behalf will more readily return the money."

It was a definite admission. "And indeed," concluded Haji Rikkan, raising his voice that the doubting boatman might hear, "who but our 'Ali could have composed the matter thus? The

government had sought the thief in vain; the Qaimmaqam was in despair; yet by the name of 'Ali al Sharji his gold was restored to the Basrawi who had thought never to see it again."

"Am I ignorant, I who live at Kumait in sight of 'Ali's tomb?" cried the boatman, ruffled at the Haji's tone. "For every tale of his deeds known to Haji Rikkan," he continued, turning to me, "I know a score, and with thy leave I will tell thee one. It is a true story, the tale of the Bald-headed One, of Sikar and Shaikh 'Abdul Hadi. Dost know it, Haji? No? Well do I remember that night, for Sikar slept in my uncle's house, and when the doctor came to dig up the body I went with him to the grave—" the boatman plunged into a wealth of corroborative detail:

The sleeping village of Razifa had been awakened by a woman's scream. "Beware of the Bald-head One, guard thyself from him of the bald head," cried the voice, and was abruptly silenced. The men of the village, hastening into the now silent hut, found its owner dead, and his wife dying. Her back was covered with dagger thrusts, as though she had flung herself down in an attempt to protect her husband. The Police Inspector, Saiyid Mohammad Effendi, was soon on his way, but before he reached Razifa the woman was dead, and the evidence of the only witness of the crime was lost. Saiyid Mohammad, having examined the hut in which Mirhun and his wife had been killed, sat in the shaikh's guest-house, asking question after question. His effort to trace a motive for the crime seemed rewarded when, after hours of cross-examination, he discovered that ten years previously, at the time of his marriage, Mirhun had quarrelled with one Sikar, a tribesman living a few miles away; for him the Police Inspector sent forthwith.

(I suggested to the boatman that so long-ago a quarrel seemed small evidence on which to base a suspicion of murder; but he disagreed.

"Among the Arabs an injury is never forgotten," he said. "Though a man let pass twenty years before he slays, the tribes will say that he is hasty in his vengeance!")

It was sunset when Sikar was brought in, and the Police Inspector at once broke off his patient questioning of an old woman

who brought a vague tale of a *mashhuf* [boat] poled by three men which she had seen leaving the village at midnight. The woman was hustled away, and after a few brief questions to Sikar the Police Inspector strode quickly across the floor and snatched the *kafiya* [turban] from his head. He was as bald as an egg.

This was conclusive enough for Saiyid Mohammad, and Sikar was taken under arrest to 'Amara. But the next day, somewhat crestfallen, the Inspector was back again. Sikar could prove a fairly convincing alibi, and had shown that the cause of his dispute with Mirhun was not such as would account for the crime.

The old woman's tale, overlooked in the stir of Sikar's arrival at Razifa, now engaged the Inspector's attention. The *mashhuf* had also been seen in a village a few miles downstream, and at daylight it had passed another, where the three boatmen had been recognized as men of the Ruhaiyil tribe. Here the trail was lost, but a distant cast in the Ruhaiyil territory again picked it up. Stage by stage it was followed to the head of the Difla canal, where it definitely vanished; but the clue, though incomplete was not without significance. At the tails of the Difla canal lived Shaikh 'Abdul Hadi, whose nickname among the tribes was *Abu Gara'a*—"He of the Bald Head."

Though investigations continued, no new facts came to light. The evidence before the Mutasarrif was of the slightest. The murdered woman had cried, "Beware of the Bald-headed One!"; a bald-head tribesman in a neighbouring village was known to have had a small quarrel with Mirhun; and the mysterious *mashhuf* had been manned by three tribesmen of a shaikh known as "the Bald-headed."

As his only chance of solving the problem, the Mutasarrif ordered both Sikar and the shaikh to swear to their innocence on the tomb of 'Ali al Sharji. Sikar, as the one of lesser birth, was to be the first to take the oath; if he affirmed his innocence, Shaikh 'Abdul Hadi would be required to swear on the following day.

"With the kinsmen of Mirhun and with the keeper of the Shrine," went on the boatman, "Sikar entered the shrine. Placing

his hand upon the lattice-work round the Tomb, he said aloud three times,

'By the truth of this 'Ali al Sharji al Kadhim, I killed not Mir-hun.'

"He left the Shrine, and as he went we watched him. He did not throw off his clothes like one mad, nor did he crawl on the ground and bite the earth, nor did he bark like a dog. He returned to Kumait and went to my uncle's house. There he supped and slept, but—in the night he died!"

"*Allahu Akbar*—Most great is Allah!" exclaimed Haji Rikkan in triumph. "Was not the truth in my hand when I told thee that 'Ali al Sharji struck dead all who forswore themselves at his tomb?"

There was a grim light in the boatman's eye, but Haji Rikkan rushed on unheeding: "For all its effendis the government could not find the murderer, yet our 'Ali knew that it was Sikar, and slew him when he swore falsely!"

"Why dost thou speak?" interrupted the boatman. "Thou hast a tongue, but so have others. May I not finish my story? Thou are like a *majarsha*, never silent. 'Ali al Sharji had erred, he had killed the innocent!"

Haji Rikkan drew his 'aba more tightly round him, and put his hand to his beard. The story had taken a turn little to his liking. He sat in offended silence while the boatman ended.

"Because Sikar died, all men held him guilty of the murder, and Shaikh 'Abdul Hadi—since now there was no need for him to swear to his innocence—returned to his place. But after some days, the doctor from 'Amara came to Kumait. 'Where,' he asked, 'is this Sikar buried?' One showed him the way; many followed him, and I among them.

"The doctor ordered the earth to be dug away and the body taken from the grave; may he be forgiven, for it was a sin. They unwound the reed mat in which Sikar was wrapped, and the winding sheet also. Then,—O Merciful!—the doctor cut open the dead body.

"After he had left us, we heard nothing for many days. Then strange tidings reached our ears. Sikar's body was full of poison! The poison had been brought from Baghdad, one of the slaves of Shaikh 'Abdul Hadi was known to have been sent thither. In the end we heard that the Mutasarrif had ordered the presence of the shaikh; but he, fearful now that his guilt was known, fled to Hu-waiza."

#### 43. Speedy Justice in the Kingdom of Ibn Saud.<sup>1</sup>

*A Sheriff's Posse of 400 scours the Desert for Camel Thieves.*

[The ruler of the kingdom of Nejd, a nation occupying the whole central area of Arabia, extended his rule, about A.D. 1927, to include Mecca. Saudi Arabia is now the usual name for his territory.]

At all times people of the Nejd are happy in the enjoyment of the dominant virtue of his reign,—justice. The truth is that in Nejd as nowhere else in Arabia is the saying, "Justice is the foundation of the State," honored in theory and in practice. The justice of Ibn Saud! We hear the word on sea and on land as we travel to Nejd and through it.

One of the first manifestations of justice is security. I have traveled five months in the heart of Arabia. Although my bags, with locks broken, were with the baggage-train, which was often ahead of us, and although among my men were several of the Bedu, nothing, not even a sheet of paper, did I lose. . . . There is more security in the desert of Arabia today than there is in the big cities of Europe and America.

How was the miracle achieved? By a return to the "shar" (or religious law). What is the justice of Ibn Saud but the "shar"—the Koranic law—the justice of the Prophet? The difference between the "shar" in Nejd and in other Arab countries, however, is

1. From *Ameen Rihani*, "In Ibn Saud's Palace" (*Asla Magazine*, October, 1926, p. 869). The narrator was a distinguished Arab, poet, historian, and patriot; friend and adviser of King Ibn Saud; and author of several books on modern Arabia.

that in the former it is summarily enforced, without favor or discrimination. To the judge, as to the executioner, all guilty heads and all guilty hands are one.

The Sultan is not without support in his maintenance of order. His governors imitate him, vie with him. One of these in particular, Ibn Jiluwi, has made himself famous in Al-Hasa—famous for his Roman justice. Indeed, when Ibn Jiluwi, cousin of the Sultan and amir, or governor, of Al-Hasa, occupies the seat of judgment, he permits neither pity nor mercy to sit with him. He sits alone, and he has made the Square of Hofuf a place of terror.

Some men of the tribe of Benu Murrah, who came one day to the palace in Riyadh [the capital city] for food and clothes, departed, after receiving them, in the direction of Al-Hasa and, finding a drove of camels on the way, made off with them. The herdsman complained to the Sultan in Riyadh, who despatched the herdsman to Ibn Jiluwi. The amir, when the herdsman arrived, sent out four hundred of his men, a hundred in each direction—north, east, south, west—to search for and capture the thieves. In less than twenty-four hours they captured also the stolen camels. When the Benu Murrah were brought before the Roman-Arab, there was a question, there was a reply, and there was the word: "To the Square!" And, on the morning of that terrible day, the sword of the executioner flashed eight times in the Square of Hofuf, and eight heads of the Benu Murrah danced on the ground.

#### 44. A Day in Court in Modern Mecca.<sup>1</sup>

##### *Conciliation is better than Litigation.*

[The narrator, an Englishman of wide Oriental experience, set out alone in May, 1925, to enter Arabia, penetrate to Mecca, and perform the rites of the Mohammedan pilgrimage. Being completely at home in the Arabic tongue and the Koran texts, and having mastered the necessary salutations and formulas appropriate to a pilgrim, he succeeded in his ambition. More than a year was

1. From *Eldon Rutter*, "The Holy Cities of Arabia", 2 vols. New York, G. P. Putnam's Sons, 1928, Vol. II, p. 103.

spent on the journey, in Mecca, and in Medina (the other holy city, containing Muhammad's tomb). The result was a book which became the most authoritative modern description of the manners and customs of Mecca,—“the strangest” he calls it “of all the cities of the world.”

Here, in Chapter VI, entitled “Laws and their Sources”, he sketches the administration of local justice.]

I went once to the Law Court, at the invitation of the Chief Cadi. The Court is situated adjacent to the north-western wall of the Haram, near the gate called Bâb ez-Ziyâda. It consists of three rooms, each of which is some thirty feet square. These rooms, together with another beside the Bâb Durayba, which is now used as a public library, were originally built by the Sultan Salim I, as a school. In each of them was taught one of the four systems of [Muhammadan] jurisprudence.

The ceiling of each chamber consists of a lofty dome, from the apex of which hangs a lamp on the end of a long chain. Two only of the rooms are used as law-courts, the third being reserved as a private apartment of the Cadi. They are simply furnished with carpets and cushions, and each of them possesses a large iron-barred window, through which the Haram is visible.

When I arrived the Court was sitting. Abdulla ibn Belayhid, a bent and wizened little man, with a red henna-dyed beard, was sitting on a thick cushion at one side of the room. At his left hand was the iron-barred window, looking into the cloisters. On his knees he held a large book, in which he was writing extracts from the evidence. His clerk, who sat at his right hand, also made entries in a book. The parties to the suit were squatting before him, on the floor, while in the doorway stood two of the Sharta, dressed in Bedouin *tharws* and kerchiefs. The old man had an insignificant presence, and a very weak voice; and the contending parties and their supporters were giving him a good deal of trouble with their eager efforts to improve or disprove one another's evidence.

As I entered the room, having previously sent in my name by one of the policemen, the old gentleman honoured me with his cordial

Arab smile, and motioned me to a seat on the cushions. The case proceeded for another ten minutes, when everybody rose and, helping his Honour to his feet, continued to support him for some time, as though they feared he might faint at any moment. But, no! he bore up; and then they all kissed his hand, policemen and plaintiffs, defendants and door-keepers, clerk and witnesses. The case would be resumed at *el 'asr* [the afternoon hour of prayer]. This fact having been ascertained, they moved towards the door.

Abdulla came and took me affectionately by the arm, and we passed into the inner room. Here we were served with luncheon by one of the policemen—rice and meat-balls followed by a sweet-meat known as *kunâfa*. In the midst of the repast the *adân* sounded, calling to midday prayers. As we stood up to say our prayers we could see the Kaaba through the window. . . . I sat for some time conversing with the old man. He told me that in Hâil [his home-town] he was accustomed to settle sometimes more than a hundred disputes in a single morning. I left him before *el 'asr*, at which hour he was to resume his session in the court.

In the East—and by “the East” I mean the unchanged patriarchal East—it is felt that when justice is dispensed by a stranger to the disputants, within the walls of a court-house, it loses the element of humanity to some extent, and becomes not justice, but blind justice. The Mekkans, then, prefer, whenever possible, to settle their disputes among themselves, with the assistance of some old shaykh whom they know, and who, even though he deliver judgment against them, will contrive to leave them without a feeling of grievance. . . .

One morning an impressive company assembled in Abdurrahmân's *mag'od*. It appeared that one Abdur Razzâg went travelling, and that before leaving Mekka he had locked up his house and handed the keys to Shafig, who was a relative of his by marriage. Shafig was to inspect the house once a week, in order to ascertain that nobody had broken into it. The charge now made against Shafig was, that during Abdur Razzâg's absence he duly made his weekly inspection, but unduly brought away with him quantities of grain, flour, oil, and other articles, which were stored in the

house. These things had been put by Shafig to his own use. Upon the return of Abdur Razzâg, Shafig faithfully surrendered the keys to their owner, telling him that everything in his house was as he had left it. Upon going to his house, however, Abdur Razzâg discovered that goods of the value of £120 were missing. The figure is Abdur Razzâg's. Shafig admitted cordially that he had borrowed a trifling quantity of grain and flour, for which he was quite willing to pay. “Take four guineas or five,” says Shafig with wide liberality, “or whatever you say.”

Lengthy and gesticulatory argument, extending over a period of days, having failed to result in a settlement of the dispute, to-day's meeting of the elders has been summoned. The judges are: Muhammad Nûr, an enormous *muttarwif* [official guide of pilgrims] from Sûk el-Layl, possessing a thunderous voice; Abdul Hâdi, a thin man with a sharp-witted air, but only one eye; and Hâfiz, a fat, jolly, and sensual-looking man. These three sit in line, with their backs to the iron-barred window. Abdur Razzâg is accompanied by two of his friends, while Amm Yûsef and Abdurrahmân, assisted by Hasan and Sabri, are the supporters of Shafig.

First of all, Abdur Razzâg tells his story with great indignation, everybody else remaining silent. When he has finished, Shafig, who is squatting languidly in the middle of the circle, is called upon for his version of the occurrence. This, being difficult of proof, is exceedingly verbose. His explanation of the matter, put briefly, is that a thief broke into the house one night. This, he says, he heard from a third person, who, however, he does not call to corroborate his story.

Upon the conclusion of Shafig's speech, which he delivers with a sort of sad restraint, which seems to be precisely the right tone for one falsely accused, Abdur Razzâg bursts forth into indignant comment. He is sharply silenced by the enormous *muttarwif*. The judges then ask him to state the value of the missing property. For answer, he hands them three pages of foolscap, on which is written a list of the stolen articles. The thin man places the

papers against his solitary eye, and reading the figure £120, he smiles broadly at Hâfiz.

"O Shafig," says the enormous *muttawwif*, "you have no right to take a box of matches, nor a grain of wheat of people's property—neither from a relative, nor a stranger."

"Look here!" says the one-eyed man to Abdur Razzâg, "the right is with you. But what will you do? Will you go to the Law Court, and demand your right, and do this, and do that; or will you accept what we rule?"

Here everybody present, including Shafig, animatedly bombard Abdur Razzâg with advice, until Muhammad Nûr, seeing, rather than hearing, him acquiesce in accepting their ruling, shouts "Patience! Listen to my speech!" At once all are silent.

"And you, Shafig! Will you accept our judgment?" he proceeds. "For good, if it please Allah," says Shafig piously. "Good!" comment the judges, in chorus.

"We are not here to sentence you to go to prison, nor to force you to anything," says my host, Abdurrahmân, diplomatically. "You have called upon us to judge between you, and what we want is to rule the matter so that you may both be satisfied, and be friends. Not so, O Gathering?" "God bless you, O my brother!" shouts Muhammad Nûr in delighted approval.

At this point, coffee arrives from Shafig's house across the way, and we all sip.

All the while the case is proceeding, these admirable judges are keenly, but covertly, observing the two principals. They note from every change of expression, every glance of the eye, and every verbal remark, how the course of the trial is appealing to each party. If either the plaintiff or the defendant appears to be really disconcerted by the course to which justice is inclining, then it is the business of Their Honours to lift him onto a happier plane, by making a move in his favour. Such a move, however, must be carefully calculated so as not to unbalance the other party seriously. As we shall see, this delicate process of adjustment goes on until, finally, with a quick run-in, justice is achieved amid general plaudits and enthusiasm.

"What we have to do," says one-eyed Abdul Hâdi, as he sips his coffee, "is to decide what is a fair sum for Shafig to pay. A hundred and twenty guineas," says he, with a tolerant smile at the company, "is . . . Tell me, Abdur Razzâg! you will accept how much?"

Abdur Razzâg mumbles undecidedly, and Amm Yûsef gets a word in for Shafig by saying quickly, "We will say fifteen guineas."

"Fifteen guineas. Do you accept this?" asks Abdurrahmân. The three judges look smilingly on.

"I have agreed to accept your ruling," says Abdur Razzâg. "But fifteen guineas! I do not accept this. Never!"

"Hear the *Fâtiha* [Koran invocation], O Gathering!" says Shafig, with an air of righteous detachment from worldly affairs. He had been intently watching his opponent, waiting tensely to hear him accept the fifteen guineas. But he had refused, so now—the *Fâtiha* and piety.

"In the Name of God, The Very Merciful . . ." repeats Shafig with saintly fervour, his right hand still grasping the mouth-piece of his shisha, his coffee-cup at his knee. "*Amîn!*" say all present, as Shafig, having come to the end of the *Fatiha*, recommences to draw at his shisha.

"See here, Shafig!" says Hâfiz, "it is quite understood that you are no thief. To take a little of the property of . . ." "Do not say that word!" (meaning "thief") says Shafig, with a grave and wounded air.

"No! Good!" says Hâfiz. "The meaning of my speech is that it is understood that you did not *carry away* the things. To take a little of . . ." "I take refuge in God from that word. That word is not good," says the wronged but patient Shafig, unable to forget it.

"I say the last word!" shouts the enormous *muttawwif*, thinking that the moment is ripe for judgment. "Shafig will pay to Abdur Razzâg five guineas now, and will also give him a writing for fifteen guineas to be paid in the Hajj . . . Do you agree?"



his voice rises to a magnificent shout in order that he may be heard above the general burst of verbal admiration which greets this historic judgment.

Abdur Razzâg at least accepts, in rather an uncertain manner. Shafig then commences a splendid speech, in which he lays stress on his perfect blamelessness; but his effort is quickly drowned by the voices of everybody present, who are joking and exclaiming in their relief at the conclusion of the case. In the midst of this uproar, the three judges smilingly rise, adjust their belts and turbans, and saying, "In the keeping of God!" they leave, amid the sustained greetings and compliments of all present.

Abdur Razzâg valued his lost property at £120, so that it is quite possible that it was worth £30. Shafig pays £20, and thus secures a good bargain. But the important point is that everybody, if not satisfied, is at least resigned, and the day after to-morrow the two principals will be cheating hâjjis in amicable partnership once more. If justice had been dealt out, one of the parties, if not both of them, would have felt himself wronged. By the Mekkan method, even the offender is made to feel more or less satisfied—more so, perhaps, than the complainant in many cases. They do not seek Justice so much as that comfortable feeling which comes of putting one's affairs into the hands of somebody whom one likes.

#### 45. Judicial Procedure in the Yaman Capital.<sup>1</sup>

*The Imam holds Court daily under the Tree of Justice.*

[The absolute ruler of the independent Yaman—that southwestern corner of Arabia, bordering on the Red Sea and the Gulf of Aden—succeeded his father in 1902. The Bedouin of the Yaman are a warlike people, constantly in feuds and raids. But the Imam rules them with an iron hand.

The narrator, an eminent figure in modern Arabism, in 1922 visited the Imam at his capital of Sana.]

1. From *Ameen Rihani*, "Arabian Peak and Desert: Travels in Al-Yaman," Boston, Houghton Mifflin Company, 1930, p. 89.

The kind Zaidi (who reminded me of the hunchback Turk in Mawia) was eager to be of service. He answered questions most gladly and volubly.

We were living in one of the many houses of the Imam, who is very very rich, and very very pious, and very very just, and very, very learned. On the floor above was not only the office of the *silk*, but the very Noble Seat of the Imamdom. And under the Tree in the yard outside sits His Eminence an hour a day to dispense justice to the people. Would I like to sit under the Tree?

I walked out with Ahmad, still thinking of the great and good Imam who chose to keep us, in the wide realm of his guidance and protection, so close to himself. But I did not sit under the Tree of Justice, for in the hall, which led to the floor above, was a knot of soldiers, squatting in a circle and quarrelling. . . . Here were the drums of the Imam, several of them of different sizes and forms, with cylinders of earthenware and brass. Here, too, were the flags and standards. But more important than flag and drum is the famous umbrella, the Sacred Umbrella (*mazallah*), about which we had heard in Lahaj, in Aden, even in Jeddah. There was, in fact, more than one, and Ahmad was quick to exhibit and explain. The smallest, about 4 feet in diameter, is used when the Imam sits in the open to dispense justice; the second, a little larger, when he goes out for an ordinary walk; and the third, the *mazallah*, is only used on Friday, when His Eminence goes to pray at the Grand Mosque.

And I jumped, not to the door, but to the conclusion that he was coming to see us. I put on my head-dress, therefore, and waited, waited. No one came. I walked quietly to the door of our courtyard, near which on the other side, a sentry stood, and applied the eye of longing to the chink of hope, and there, as if I were gazing into a picture machine, I stood spellbound.

There, under the Tree of Justice, was the Image of Perfection, seated on a stool, with one indigo soldier to his right bearing high the sword of State and another to his left holding over his head one of the Imamic umbrellas. Before him sat cross-legged on the ground a scribe, and around him was a crowd of people of every



rank and class, in turbans and shawls of all colours as well as in rags, waiting to be heard. And everyone was heard. Quietly, the pristine scene rolled before my eye and to the satisfaction, evidently, of the Imam and the people.

Two full hours sat the Image of Perfection under the Tree of Justice, and then, forgetting that he had two captive guests only 15 yards away from him, he went on his regular daily tour of the city, preceded by a platoon of the soldiery and accompanied by a multitude of his beloved subjects. . . .

More than once, even during our incarceration, have I seen the Imam sitting for one or two hours at a stretch, without once raising his voice. Attentively, patiently, cheerfully, compassionately, he heard and judged. But a few cases, which required legal consideration, were referred to a court of justice.

This custom of holding open court is older even than Al-Islam in Arabia; but it was popularized by the Orthodox Khalifs, and a few of the rulers of Arabia to-day still maintain the tradition. In San'a, as we have seen, it is nobly upheld in practice. But there is a reason. Some of the guards at the doors of the Imam, yielding to the temptation of *zalat* [money], sometimes admit into the *majlis* [office] a man less deserving than those who had long been waiting to be heard. Rather than punish the guards, therefore, it is easier to remove them, relieve them of service, one or two hours a day, at which time no one shall stand between the Imam and the people. Even after the daily session, under the Tree of Justice or in the Square, he continues, on his tour through the city, to receive petitions. The open-air tribunal becomes a circular court. Thus is spent one-half of his day; the other half he devotes to the affairs of State.

#### 46. Bedouin Justice in the Yaman Desert.<sup>1</sup>

##### *A Youthful Killer voluntarily seeks Trial.*

[The narrator was a British political officer in Mesopotamia during and after the World War 1914-1918. He then became Prime

1. From *Bertram Thomas*, "Alarms and Excursions in Arabia", with a preface by Sir *Arnold T. Wilson*; London, George Allen & Unwin, 1931, p. 271.

Minister to the Sultan of Muscat and Oman, two important principalities in Southeast Arabia. His explorations in Arabia made him a first-hand authority on Bedouin customs.]

A sparse population inhabits these Southern borderlands, where life is supported almost solely by camel- and sheep-breeding and the spoils of war—a precarious nomadic existence, bloody withal, whose ethics are elemental, practical and cruel. An unwritten law—it could not be otherwise with illiteracy so general—governs Badawin conduct, so far as it is governed at all.

This code has come down out of the unchanging centuries,—*Hukm al hauz*, as it is called . . . . Its interpreter or magistrate is an old wiseacre of the tribe—not always or necessarily the shaikh. When the two roles are not combined, indeed, the shaikh sometimes has to bow to his decision—the decision of one who has acquired the position by the fame of his knowledge and experience, and the traditional rightness of his judgments.

A story is told (true, it is said) of a famous *hauz* of this very Yal Wahiba tribe. A youth had murdered his maternal uncle—a most serious affair, for although it is the paternal side of the family that is privileged in the matters of the hand of a daughter and major inheritance of a dead man's estate (failing male offspring), yet, with these Badawin, the mother's brother is in sentiment rated above a father's brother (and, incidentally, the Badu, unlike the town Arab, will take his mother's name rather than his father's. But that is by the way). Murder, according to the Islamic *Shar'a* law as practised, is not an offence against society, or at least is not judged by this standard. True, between tribes it is a corporate offence, but within a tribe it is one against the family of the murdered man only. The next of kin, a son, and, failing that, a brother, and failing him again, the male paternal cousins, have a right to forgive the offence and take blood-money from the murderer in expiation; for the *Shar'a* theory of an eye for an eye is nowhere observed in South-East Arabia.

The youthful murderer was mortified with grief when it was too late, and, although the family of the murdered man forgave him, he would not be comforted.

"My coat is black," he said. "I am no more acceptable in the assembly than a woman. Life is no longer dear. I must expiate my deed."

He disdained forgiveness and an easy requital with the blood-money which *Shar'a* would have decreed. He would betake himself for judgment to the *haus*.

The old man listened to the story of the young murderer as he eyed him narrowly. "It is well thou hast come," he said. The tribe, viewing this as no ordinary murder, waited with bated breath a judgment that would not lack in severity. The moment for its announcement in the open-air assembly had come, the young penitent kneeling in customary suppliant way before the seat of judgment.

"Listen," declaimed the *haus*, "*Ya fulan*," and he named the young man. "In the bottom of yonder dry well will be planted some spears with their spikes pointing upwards. My judgment is that thou start from there"—and he indicated with his cane a spot some fifteen paces from the well-mouth—"thou shalt turn thy back upon the well and walk backwards until thou fallest into it. Thus will the stain be removed from thy name. Whether thou diest or livest, the crime thou has committed will then be expiated."

A wave of horror spread through the circle of tribesmen that half-sat, half-knelt, around, and a cold hush fell upon the proceedings.

"*Insha'allah!*" [God's will be praised!] was all the young murderer said in pious acquiescence. He was conscious that this meant certain death, death of a horrible kind, yet was it the only honourable path. To shrink from it before his tribe were unthinkable. He might die. His deed should live.

And so spears were brought, and the well was prepared. The young Badu was taken to the appointed place, and there, facing about, he moved calmly backwards towards his doom, and, reaching the brink, leapt as he was bidden. But ten stalwart Badus, who had been placed there ostensibly to be witness to the immolation,

threw their arms about him as he was about to fall within, having been ordered privily to do so if things reached this pass.

The old man looked into the young man's eyes as he was brought before him again, "*Ya fulan!* go back to thy tribe," said he, "thy coat is black no longer."

Such is the story told of the days of Saiyid Turki, the grandfather of the present Sultan, and ruler of Muscat and Oman. And the young Badu who unflinchingly had shaken death by the hand was none other than the famous Hamid bin Khalfan, who lived to be paramount shaikh of this Yal Wahiba tribe, and a great man in the land.

#### 47. Justice among the Bedouin of Egypt.<sup>1</sup>

##### *A Morning Session of the Sheikh's Court; and the Ordeal of the Red Hot Spoon.*

[The narrator was for some years administrative officer under the Egyptian Government in the Libyan Desert and in Sinai. His monograph devotes itself in full detail to the judicial life of the Arabs of that region, and is one of the choicest permanent contributions to demography.]

The selection is placed here under "Arabia," because the tribes of those regions, though somewhat mixed in stock, are direct descendants of the Northern Semite stock and are genuine Bedouins, i.e., nomadic desert dwellers.]

It may be taken as an axiom that tribal custom and law presuppose the existence of a very definite—if elastic—organisation of tribes, sub-tribes, groups or families, each unit having its own head, who acts automatically as magistrate, peacemaker, or jurymen. In addition to these heads or sheikhs there will invariably be found other old men, who are recognised owing to their age, experience, or wisdom as assistant magistrates, or who may be called upon to give evidence on oath as to precedent or procedure adopted in similar known cases years ago.

1. From Austin Kennett, "Bedouin Justice: Laws and Customs among the Egyptian Bedouin," Cambridge, England, University Press, 1925, pp. 13, 35, vii, 107.

The Bedouin Law cases, or "Ourfi" cases (as they are called from a classical Arabic word implying "what is known" or "what has become a custom"), fall chiefly into various categories, under which they will be dealt with in due course. The principal of these are Bloodmoney, for blood spilt or a life taken; Damages, for blows or wounds received as the result of assault; Land disputes, concerning grazing areas or rights of cultivation; Debts, and various other cases involving litigation concerning share of property, dowries, alimony, divorce, stolen and strayed animals, and so on.

My first real introduction to the Bedouin proper was at a Bedouin "Ourfi" Court, now some years ago. I can still see the picture vividly—the brilliant colour scheme, the picturesque group of sheikhs seated in a semi-circle, gesticulating, smiling, frowning, shouting or silent, as the different cases came up for hearing. The litigants themselves, some poor, some obviously wealthy, with their various complaints, made interesting character studies; while the assessors of the Court, with their own inimitable way of dealing with the litigants, were equally fascinating.

First an old man came in, having travelled six days from some remote spot to take over another instalment of blood-money belonging to a murder case of ten years' standing.

Then a dear old lady, nearly blind and quite toothless, came in with a voluble (if pathetic) story of how a stray camel belonging to a neighbour had trodden heavily on the beautiful tin bath in which she washed the clothes and made the bread, and had bent it, and cracked it so that it leaked. What were the Court going to do about it? The sheikhs listened patiently to the sad story; then one of them questioned her. "Tell me, oh my mother, is it not true that thou art old?" The old lady replied with pride that she was over a hundred years old. "And is it not true that thou wast once very beautiful?" This was also readily assented to, with accompanying explanations and reminiscences. "Was not this bath a very good one?" The old lady assented dubiously, not quite following which way the argument was turning. "But just before it was broken, was it not, like thyself, just a little old?" The story was eventually arrived at, each point being extracted from her with difficulty. It

appeared that her son had "won" this bath years before from an Italian officer's servant during the Tripoli war, and that it had been her most cherished possession ever since, but that it was on its last legs when the camel subjected it to such very rude treatment. The sheikhs then asked the owner of the camel if he had seen the bath, and at what he estimated its value, which was finally assessed at one shilling, and paid for in Court. The old lady accepted the payment solemnly, began to recapitulate the story of the bath all over again, until she was gently but firmly suppressed, and, as she turned to leave the court, an almost imperceptible flicker of one eyelid to the sheikhs proclaimed the fact that she felt that she had not done too badly.

The next case was brought by a man called Himeida against another Arab called Farag. Himeida stated that he had lost a she-donkey about two and a half years before, and after looking for it and making all sorts of enquiries, at last found both the donkey and her foal in the possession of Farag. He called upon Farag as defendant to account for his possession of the animals, and Farag was able to prove, not only that he had bought both foal and mare in the open market in all good faith, but also that he had no means of knowing that the mare was stolen. Himeida succeeded in establishing his original ownership, and the case was peacefully settled by Himeida taking the mare and Farag the foal.

An attractive looking young woman, Aziza by name, then came into Court covered in Bedouin jewelry, and followed by a man. She affected to be painfully shy and self-conscious, in the intervals of ogling the Court generally, and myself in particular. She began to tell how she had been passing the tent of the defendant Korayem, when Korayem's dog rushed out and flew at her. At the memory of what had happened she became very excited, and brushing aside her veil forgot all her previous shyness, expostulating and gesticulating wildly, while her voice rose into a shriek. She went on to explain that she had tried to throw stones at it, but that the dog had rushed at her savagely, bitten her, and torn her clothes. The Court asked if she had any wounds to shew, or other evidence to corroborate her story: and in the most natural way in the world,

the good lady pulled up her skirt and displayed a shapely knee, which she affirmed had been bitten, and also produced an old dress claimed to have been torn by the dog. A fatherly old sheikh examined the alleged wound and announced that he could see nothing. Korayem in his defence narrated that he had a very useful watchdog, which would not let anybody come within one hundred yards of his tent, and when Aziza, instead of giving him a wide berth, passed quite close to the tent, naturally the dog rushed at her. The sheikhs decided that after all the dog had done nothing amiss in rushing at her—was not that his purpose in life?—but that as Aziza's dress appeared to be rather the worse for wear, they would give her the benefit of the doubt, and award her five shillings for the damaged garment.

And so the cases went on: until one of the sheikhs announced forcibly and unmistakeably that he was very hungry and thought it was quite time to adjourn for lunch. So the meeting was adjourned, to continue after an hour or so. . . .

In the Western Desert the head of every family to a certain extent assumes the rule of magistrate within the confines of his own unit, and the assessors for any particularly important case will usually be chosen from among sheikhs who have proved themselves able and equitable lawgivers. But in Sinai, although any man with a reputation for probity and well versed in Arab Law may be chosen, there are also other posts which are regarded as hereditary, always provided that the hereditary holder of the post shews himself intelligent and sufficiently equal to the particular knowledge that he has inherited from his forebears. Thus, in Sinai alone, two or three families have a reputation for being experts in assessing wounds, and the special knowledge of the bones and muscles of the body and the schedule of damages and wounds provided by Arab Law are handed down religiously from father to son.

But the most interesting of all these hereditary experts in Sinai is the individual who carries out the Trial by Ordeal, or the "Hereditary Holder of the Red-hot Spoon", as a previous Governor of Sinai has so happily named him. There is in Sinai only one man—a quaint little old Arab called Sheikh Hamdan of the Ayayda tribe

—who inherited this post from his father, and who carries out his Ordeal all over Sinai. There is a similar expert among the Amran tribe east of Akaba, and another near Medina in the Arabian Peninsula. It was the writer's privilege to be an actual eye-witness of the Trial by Ordeal, by special invitation from the Holder of the Hot Spoon himself.

In order to understand the meaning of the "hot spoon," it must be realised that all the Sinai Arabs are experts at making coffee. They buy the green coffee beans, make a charcoal fire, and roast the beans over the fire fresh for every occasion in an iron receptacle rather resembling a flattened-out soup ladle. The roasted beans are then pounded up in a mortar, to the accompaniment of rhythmic beats on the side of the mortar. This receptacle is the "spoon" referred to.

The trial by ordeal is employed to settle disputes in the absence of evidence, usually only the more serious charges being disposed of in this way. Just as the Sinai Arabs are loath to employ the oath in their disputes, unless it has been found impossible to come to a decision by any other means, so do they reserve the "Bisha" (as they call the trial by ordeal) for the more important cases only, being anxious that the solemnity of the ordeal shall not be lost by frequent appeal in trivial cases. The procedure is as follows:

When a suspect is accused of murder, theft, or any other serious charge, after heated affirmation of the truth of the charge on the part of the accuser and equally vehement denials and repudiation on the part of the accused, it may be mutually agreed that the case shall be taken to the Bisha for decision. The accuser and accused must first agree upon a neutral third party, whose duty it is to watch fair play between the two, from a strictly impartial standpoint. This individual is entitled by law to a fee varying from £5 to £10 for his trouble, while the Sheikh of the Bisha is paid another £5, these expenses being paid afterwards by the losing party. The three then go to the Sheikh of the Bisha, either in his own house or at some pre-arranged place in the desert, the whole proceedings being open to anybody to watch, and there being no secrecy or staging of any kind. At the time of the meeting the Sheikh of the Bisha

also calls in two other specially chosen witnesses, who must of course be approved by both parties.

In the particular instance in which the writer was an eye-witness one Arab from Southern Palestine had accused another Arab from Khan Yunis of murdering his son. The boy had been found dead in the desert, and the body had been examined by the Government doctor, who had found no signs of violence whatsoever. There were, however, circumstances which threw a certain amount of suspicion on the accused, whom the boy's father charged with suffocating the lad. The accused protested his innocence, and challenged the other to support his charge by evidence.

In spite of the entire absence of evidence, the father persisted in his accusation, and threatened that reprisals would be taken. The accused—apparently unwillingly—eventually consented to undergo the trial by ordeal, and the other agreed that if the Bisha decided in favour of the accused he would drop his claim. Arrangements were duly made, the Sheikh of the Bisha came from his home in Central Sinai up to El Arish to meet the litigants half way, and paid an official call on the writer, whom he invited to be present at any time or place convenient. The meeting was fixed for late afternoon, in the shade of a tree near the Government offices.

A charcoal fire was burning, and a group of fifteen or twenty onlookers squatted in a semi-circle around the fire, in company with the accuser and accused, their mutual assessor, and the two chosen by the sheikh himself. In the centre of the group, two or three paces in front of the rest of the assembly, sat the Sheikh, stoking up his charcoal fire, on which the "spoon" was laid, with the sticks of charcoal built up round it. Some of the men were smoking cigarettes, others puffed contentedly at their enormous pipes, and the shadows from the big tree over the yellow sand completed the peaceful scene. It was difficult to believe that in a few moments one of those present would be tried for his life, his fate hanging on the ugly iron spoon in the charcoal fire.

The buzz of conversation suddenly stopped, as one of those present made a last effort to reconcile the litigants, and appealed to the accuser to accept some form of compromise. His effort was

unsuccessful, the accused himself, a swarthy Arab with finely chiselled features and a short black beard, declaring that he would not shirk the ordeal at this stage of the proceedings. He seemed quite unconcerned, took out a cigarette and lit it from a burning stick at the edge of the fire.

After a few minutes the Sheikh of the Bisha intimated that the spoon was hot enough, and directed the accused to come and kneel just behind his left shoulder. "In the Name of Allah, the Merciful, the Compassionate" crooned the sheikh, as he quietly said a prayer, in which all present reverently joined. A small pot of water was then passed to the accused, who rinsed his mouth and spat noisily, after which the three assessors carefully examined his mouth, lips, and tongue. Taking the handle of the spoon in his right hand, the Sheikh withdrew the spoon from the fire, flicked the ashes off its upturned bottom with his other hand, and presented it glowing red to the accused at his left elbow.

For one brief moment the accused paled, his dusky skin shewing ash-grey; and then, pulling himself together, and tightly grasping his sword with both hands, he put out his tongue and licked the hot spoon. As his tongue returned to his mouth, the black mark of the ashes was clearly seen. "Again", called the crowd; and this time rather frightened and unwilling he forced himself to comply. A third time he leant forward—this time recklessly—and licked the spoon, while the onlookers strained forward eagerly to watch the ordeal.

The Sheikh passed the pot of water to the accused, who had by now released his nervous grasp on his sword; and after again rinsing out his mouth, the accused returned the water to the Sheikh, and squatted on the ground. The Sheikh poured some water into the spoon, and the noisy boiling and the steam, together with the complete disappearance of the water, satisfied any doubts as to its temperature. Three times the Sheikh poured water into the belly of the spoon—twice it boiled away immediately, and once it remained. Then he poured more water into the cup-like depression at the base of the handle, and again the water boiled away. When

the spoon had been completely cooled, the Sheikh called together his two witnesses and the assessor nominated by both litigants, and the four then ordered the accused to put out his tongue. With supreme self-confidence he obeyed, and clearly visible to all was his tongue looking perfectly healthy and natural. "Clean," declared the Sheikh; "Clean," echoed the witnesses, and a group of onlookers (including the writer) went up to examine his tongue and mouth more closely. On closer inspection the faintest possible trace of a black ashy smudge was just visible in the centre of his tongue, which was otherwise perfectly healthy and normal in every way.

The Sheikh raked out his fire, and put away his spoon; the onlookers rose to their feet and went about their business, while one or two congratulated the accused on his acquittal. The proceedings were remarkable throughout for the complete absence of mummary or artificial excitement of any kind. Apart from the suppressed emotion for one brief moment on the face of the accused just before licking the spoon for the first time, nothing could have been more cold-blooded or more aggressively matter-of-fact. . . .

Enquiries as to other cases submitted to the Bisha for trial have elicited the fact that this form of trial is still comparatively common in Sinai, Palestine, and the Hedjaz, and that the findings of guilt are as numerous as those of acquittal.

#### 48. Bedouin Justice in the Sinai Desert.<sup>1</sup>

*A Killer is personally Absolved; but the Tribal Feud must be ended by the Ordeal of the Red Hot Spoon.*

[The narrator is a British officer who for some twelve years in Palestine was in command of Arab troops and tribal areas.]

As the piercing call of the *muezzin* split the dawn air, the mustered Bedouins of the Beni Hassan and the Terrabin tribes, cursing and rubbing their bearded faces, struggled from their sleep in the black tents. This day it behooved all to observe the formal hours

1. From *Douglas V. Duff*, "Desert Law", *Asia Magazine*, July, 1934, vol. XXXIV, p. 448.

of prayer; for was not the great *Mekhemeh*, the Tribal Court of the Desert, to be held before the sun grew too hot for men to bear its burning rays?

In the great square between the sun-dried, desiccated remains of what once had been the base-camp of a mighty army, in the days when Imperial Turkey had sent her thousands to die in the desert or before the rifles of the *Anglizi*, the hundreds of desert fighting-men assembled to greet the day with Islam's morning prayer. Water there was none to spare; the ablutions prescribed by an all-wise Prophet were performed with the silvery sand that the winds had piled against the tumbledown huts.

With the conclusion of prayers the Mekhemeh was quickly formed; for the frugal breakfast of the Bedouin could be eaten as men moved about their business. The judges, sheikhs of the neighboring tribes, solemnly and sedately took their places in a semicircle on the shady side of the large house in which Turkish and German staff officers once had planned the capture of Egypt and from which the whole of this ruined encampment of Auja el Hafir could be seen. As each sheikh arrived, he paid ceremonial greetings to his brother judges, touching mouth, brow and breast in the sweeping gestures of immemorial usage.

Judges and spectators rose to their feet when the aged Sheikh Ibrahim Rustum abu Skander, of the mighty Beni Sakhr tribe, and the British *Muhdir* of Beersheba took their places. The old man, who, by virtue of belonging to a distant and therefore presumably impartial tribe, was to be President of the Court, gravely returned the greetings and motioned all to be seated. The Muhdir likewise returned the salutations of his chieftains and then ostentatiously squatted down, like any Bedouin, a few feet away from their semicircle, to emphasize the fact that he was not connected with the deliberations of the Court. All around squatted the great crowd of Arab warriors, swords belted to their sides, daggers in waist-cloths and rifles at their sides, since none could tell when another tribe, bent on *gazu* [raid], might suddenly fall upon them.

The case today was one of murder. A young man had been killed some months previously, and both his parents and his tribe

had come to see justice done. Sheikh Ibrahim, looking around at his fellow judges, murmured, "With your permission, Brother Sheikhs." At this they all gravely nodded and said aloud, "Stand forth, O Mustafa ibn Mohammed el Amar, and Khalil your brother." From amongst the mustered tribesmen two young warriors arose. Unstrapping their swords and handing over their daggers to their kinsmen they strode into the open space before the judges and saluted with right hand on mouth, forehead and breast. And from the whole bench of judges they received the greeting: "*Wa alaykum es salaam, ya walad*—And on you be peace, children."

They were motioned to stand to one side, while the accusers saluted the judges. The father of the victim, half-blind and walking with a slight limp, began, "In the name of Allah, the Compassionate, the Merciful, I claim justice for my dead son against these murdering dogs of the Beni Hassan."

He was interrupted by an angry buzz from the assembled men of that tribe and by a rebuke from Sheikh Ibrahim: "Call no man dog, brother; for are not all True Believers brethren? By so naming them you insult yourself; are not brothers all of one blood and description?"

The old father apologized and resumed in a quieter tone: "It happened in this fashion, O Your Honors the Sheikhs. My son Khaled was sent by me to the Muhdir in Beersheba to report the theft of seven camels from my tents, and, since he was going to the town, I also sent ten sheep, five goats and two horses with him to sell in the *suk* [market]. He had nine angliz gold pounds with him to pay Saiffedin, the merchant of wool; for there is an account between us for ammunition and clothing. With him I sent my slave Yussef el Nur, whose fathers have been with my fathers ever since they were brought in ancient days from Africa by my grandfather's great-grandfather, who was a mighty trader in the land of Abyssinia. Near to the abandoned town of Ashluz, these two sons of shame who now stand before you did fire upon my son and kill him. Yussef fled for his life and reached my tent with the story.

"Then, gathering my herdsmen, I sent them with Sami, the son of my brother, in pursuit of the killers. Burdened with the beasts as they were, they did not overtake them until close to Jebel Usdum; but, even as they did so, a large party of the Beni Hassan appeared, and my men had to retire. Behold, the two men made no secret of their deed and shouted after Sami, my brother's son, 'Tell Nureddin, that old fox, that it was we, Mustafa and Khalil, the sons of Mohammed ibn el Amar, who slew that whelp of his.'"

The father ended with a plea for vengeance. His story was confirmed by Sami, by the negro Yussef, and by the other kinsmen who had pursued the murderers.

Then the old sheikh ordered the two youths to tell their stories.

Mustafa, proudly drawing himself to his full height, declared: "True it is that I killed Khaled, but the stories of his father and of the negro slave are untrue. As they say, it was near Ashluz that we met them, I and my brother Khalil. But we did not shoot them; for neither of us had guns. While we were sleeping close to the well that lies near the town, Khaled and the slave suddenly fell upon us. I had but time to draw my sword as Khaled attempted to stab me. Well fought Khalil, and well fought I, he fighting the slave, I, his master. The slave escaped before the sword of Khalil, and with a mighty blow I slew Khaled."

"Then why did you flee with the sheep, goats and horses, O my sons?" asked the old sheikh. "If there was no ambush, and you killed him in fair fight, why did you rob him?"

Mustafa looked amazed. "O my father," he answered, "what Son of the Arab would not take what God had sent him? Were not these animals the spoil of my sword? Did I not do as any of our race would do?"

The sheikhs nodded their heads. After all it *was* the natural thing to do.

"Why should Khaled have attacked you?" asked Sheikh Ibrahim. "You had no rifles or anything else with you that could have tempted him to kill you."

"Your Presence, it was a matter of blood-vengeance. For many generations there has been feud between my people and his people," answered the younger brother.

"And what is the reason for this feud?" asked the old sheikh, only to be met by the confused glances of the accused. They did not know the origin of the feud; they knew only that it existed.

The negro was recalled, and, skillfully cross-examined by the sheikhs, he admitted that the accused had told the truth. An old minor sheikh of the Terrabin was then asked to give an account of the blood feud between the tribes.

"I am an old man," he declared; "how many years I have is known only to the Lord of the Day of Judgment, but old I must be, since I remember the soldiers of the Sultan catching many of my tribe to force them to go to the *Harb el Moskhobe* [the Crimean War, 1853-1856], and I was then old enough to have to avoid the soldiers. My father told me that his father had seen the beginning of the feud between the Sons of Hassan and the Terrabin. It happened this way. When the great Frank Abuna Barte [Bonaparte] came to the city of Gaza, he gave much gold to those who would fight with him against the Turk. Many of the Terrabin and the Beni Hassan fought for him, both as foragers and as scouts. When he was forced to leave the country, and the Turks came back, behold the Sheikh of the Beni Hassan purchased safety from Jezzar Pasha, the Butcher (may his grave be defiled!), by betraying the names of three score of the Terrabin who had fought for Abuna Barte. These sixty men did Jezzar Pasha hang in the market place of Gaza. Ever since that day there has been feud between the tribes."

The Beni Hassan promptly produced an equally old man, who told the same tale, except that in his version the Terrabin were the traitors and the Beni Hassan the victims. After the sheikhs had listened gravely to the two stories, they adjourned the Court, ordering all men to keep the peace and to reassemble for the verdict one hour before the evening prayer.

As the westering rays of the sun lost their fierce intensity, the tribesmen gathered again, and gravely the sheikhs resumed their

places. Accused and accusers stood in the hollow square, and all listened intently to Sheikh Ibrahim:

"We find that the two accused did kill Khaled, and that they are guilty of his death. Yet we realize that this was done in battle and that there is no question of murder. We have decided to attempt to make peace between the tribes, so that this old feud may cease and no more of our fine young men be slain in such useless quarrels. Therefore, at the next full moon, the heads and sheikhs of both the Terrabin and the Beni Hassan will meet me here. In the present case the Court does not desire the death of the two youths or their imprisonment, since imprisonment is worse than death to freemen of the desert. But justice must be done to the bereaved father; for behold his one remaining son is touched by the Hand of God [is a lunatic] and can be of no service to him. Therefore we decide that a fine of one hundred camels shall be paid as blood money to the father."

There was a murmur of dismay from the tribesmen of the accused and of satisfaction from the tribesmen of the victim. But all realized that there was a further step to be taken, in accordance with ritual.

The British Muhdir rose slowly to his feet, made his salaam to the Court and spoke impressively as follows: "O my father, Sheikh Ibrahim, and you, my brothers, Sheikhs of this Mekhemeh, your sentence is just and merciful, and fortunate indeed are these young men to have had such lenient judges. But I know that the stricken father wishes to make no profit from the death of his son Khaled. All that he requires is his due. Therefore, O Father of Khaled, and you, Most Wise and Just Judges, for my sake, for the sake of one who, though set over by the government, yet knows himself to be but a child towards you in wisdom, reduce this fine by twenty-five camels."

His request was granted, and he sat down. Then each notable made a similar request, asking for a reduction in accordance with his importance. When the fine had been reduced to eight camels, every one was satisfied. The blood money was paid, and the tribal



gathering retired to its tents. Before dawn, Auja el Hafir was again deserted.

When the Court assembled a month later, it made a vain attempt to decide which tribe had been responsible for the beginning of the blood feud. After hours of fruitless discussion Sheikh Ibrahim rose to his feet and said: "Since it is impossible for us to arrive at any decision, with the truth of this matter hidden in the mists of time and known only to Allah, I wish to ask you both if you are willing to leave its unraveling to Allah, the Compassionate, the Merciful, the Solver of all Difficulties?"

Both sides agreed. It was decided, therefore, in accordance with ancient custom, to have a trial by ordeal. Certain sheikhs were entrusted with the responsibility for making the arrangements with the only man left in Palestine capable of administering the ordeal.

Accordingly, at the full of the next moon, in one of the valleys of the Judean range, south of the village of Dahar-iyeh, the warriors of the two tribes met. Allah Himself was to adjudicate the disputed question.

At the mouth of a small cave in the mountain side, blazed a small, intensely hot fire, tended by an aged Arab, wearing the turban and cloak of an Imam. Near him in two compact groups squatted the sheikhs of the rival tribes, with old Sheikh Ibrahim and his brother judges, accompanied by the Muhdir, sitting apart from them. The paramount sheikhs of the two tribes sat close to the fire; for the ordeal was to be undergone by them personally. The high-pitched, wailing, cracked voice of the aged Imam suddenly rose, and a deep hush of expectancy settled over the crowd of warriors and judges. Even the Muhdir bent excitedly forward; for this was the first time that he had seen the ancient rite performed.

The Imam turned and faced the disputant sheikhs, and, raising his voice almost to a scream, said, "Do either of you know that you have lied?"

Both swore to their truthfulness.

"Are you both willing to endure the judgment of Him who is the Lord of the Day of Judgment?"

They said that they were.

"Then abide by His Judgment!" screamed the old man. Drawing a long-handled, glowing, white-hot spoon from the heart of the fire, he laid it on the tongue of each sheikh in turn. The sheikh of the Beni Hassan emerged scatheless from the ordeal. But the Terrabin chieftain howled with pain as he clapped his hands to a badly burned mouth.

A deep-throated shout of "*Al hamd lillah*—Praise be to Allah," broke from all present. Immediately silence was requested by old Sheikh Ibrahim, who said: "See, O Sons of the Arab, Allah has spoken and has discerned the True from the False. Yet let men not say that the Terrabin have lied. The cause of your feud was so far in the past that no doubt each man thought he spoke in truth. Two months from now let all meet again at Auja el Hafir, so that the *diyat* [fine] may be paid and peace be restored between your tribes. In the meantime all steps toward prosecuting this feud are forbidden by the sheikhs of both your tribes."

The last scene in this desert drama was laid, like the first, in the deserted, ruined encampment. On one side of old Sheikh Ibrahim, who was accompanied by three hundred fighting men of the Beni Sakhr, his own tribe, sat the men of the Beni Hassan; on the other, the hundreds of the Terrabin.

When all was ready, the old Sheikh Ibrahim rose: "Allah himself has spoken in this case, O Sons of the Arab, and it only remains for us to proceed to judgment." This was merely a matter of form, since the terms had been settled between the sheikhs of the two tribes during the two months' interlude. "The Terrabin shall pay one hundred lambs of the flock, fifty goats, ten camels, five mares and one stallion, together with twenty-five cows and five young bulls to the Beni Hassan as blood money, the *diyat* [fine] which shall close this long and bloody feud between you."

Both sides acclaimed the award and expressed themselves as satisfied.

The Paramount Sheikh of the Beni Hassan now rose slowly to his feet and, raising his hand, called for silence: "Praise to Allah for his Judgment! But let no man think that the Sons of Hassan wish to profit from the ancient quarrel, a quarrel now happily ended. Therefore, to show my friendship for my brothers of the Terrabin, do I remit three out of every four head of the animals awarded me in the judgment of my wise lord, Sheikh Ibrahim. And to every beast that the Terrabin pay me do I add one more, except the camels and the horses. Let both my gift and that of the Terrabin be slaughtered and cooked here in this place, so that there will be a feast worthy of such an occasion as the foundation of friendship between our peoples."

All present signified their approval of these gracious words. More flowery speeches followed, hours of them, until at last the roasted meats and other dishes were brought in and set before the sheikhs. There were lambs roasted whole, set on top of mountains of rice, stuffed with pistachio nuts, mutton stews, bowls of *laban*, flat loaves of bread and heaps of *couscous* brought from far-off Beersheba. As soon as the sheikhs finished, the feast was set before the fighting men, and later the remnants were brought to the women and servants. With bellies mightily distended by the unaccustomed profusion of meat, the Bedouins contentedly turned their bearded faces to the starry skies and slept the sleep of the perfectly just; except for the few who, rifle in hand, protected the slumbering camp against any sudden foray of the warriors of other tribes, always on the lookout for an unguarded moment.

Peace settled on the black tents of the sons of Ishmael, on no one more than old Sheikh Ibrahim who had brought two hostile tribes into amity. He slept as soundly as any just man under the canopy of heaven.

## Chapter 10

# CHINA

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49. *The Administration of Justice in the Chow Period.*
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  - (2) *The Family Blood Feud.*
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  - (1) *The Case of the Lover and the Priest.*
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51. *Trial of the Portuguese Merchants accused of Piracy, A. D. 1560. Fair Treatment for the Foreigners.*
52. *Trial of an Englishman for an Accidental Homicide, A. D. 1808. Discharged but Deported.*

[Introductory. The conventional traditions of China's history go back to about B. C. 2000, and in some legends even to B. C. 3000; but definite dates for historical events begin from about B. C. 1000; the first absolutely determined date being B. C. 841. By that time some sort of a system of organized justice was developing. To the ensuing period is attributed the passage from King Muh, below, in No. 49.

A long series of enactments on various topics then follows during the next ten or twelve centuries, as well as several fragmentary codes or edicts of various dates. During this period are found occasional allusions to trial-methods, as seen in the second and the third quotations below in No. 49, attributed to Confucius. But (so far as appears from translated literature) no chronicles of actual trials are available until the second millennium A. D., when a number of memoirs of celebrated magistrates appear, relating anecdotes of trials, as shown in No. 50 below.

From the 1500s onward are found narratives of foreign merchants and other observers, giving eye-witness accounts of the advanced methods of trial then in use, as shown in Nos. 51 and 52 below.<sup>1]</sup>

## 49. The Administration of Justice in the Chow Period.

[The classic period in Chinese history for the development of principles of government was that of the Chow dynasty. Extending nominally from about B. C. 1122 to B. C. 256, the first half of the period, from B. C. 1100 to 600, represents its flourishing time. In the second half, when disintegration ensued, appears Confucius (B. C. 551-478), or Kung Fu-tsze, the Master Kung, exemplifier and expounder of the maxims of the golden age of

1. For a full account of the developed system of Chinese law, see Chap. 4 of the present writer's "Panorama of the World's Legal Systems" (West Publishing Co., St. Paul, 1928 and 1936). For the chronology, see the authoritative work of H. G. Creel, "The Birth of China" (New York, 1937).

China, figuring in subsequent times as the revered statesman and teacher of established moral principles. The classic books preceding him, with his comments on them, the traditional anecdotes of his life, and the interpretative comments of the next few generations, are the chief sources of our information for manners and customs of that millennium. Not all of these chronicles can be dated accurately or even approximately; nor can all of the anecdotes of Confucius' life be deemed authentic. But at least they represent what was accepted and revered as authoritative by later generations.

Nevertheless, though morals and law play a large part in these chronicles, there are extant no narrative reports of trials exhibiting actual practice. It must suffice, therefore, to present three of the rare passages that throw light on some part of trial-procedure:

The first passage contains some royal directions given to the Minister of Justice. The second passage discloses Confucius' attitude toward the blood-feud. The third shows him consulting public sentiment when trying a case.]

(1) *King Muh's Instructions to his Judges, B. C. 910.*<sup>1</sup>

[The fifth king of the Chow dynasty was Muh, reigning B. C. 961-906, and dying at the age of 100 years. Toward the end of his reign, he is said to have imparted to his Minister of Justice the wise warnings of his accumulated experience:]

The King said to Leu: "Ah! you who superintend the government and preside over criminal cases throughout the empire, are you not constituted the shepherds of Heaven? . . . Listen all of you to my words, in which, it may be, you will receive a most important charge.

"You will tread the path of satisfaction only by being daily diligent;—do not have occasion to beware of the want of diligence. . . . When both parties are present, with their documents and witnesses all complete, let all the judges listen to the five-fold

1. From *James Legge*, translations of "The Chinese Classics", London, Trübner Co., 1865, vol. III, part II, pp. 598-610; "The Fifth Part of the Shoo King, or the Books of Chow", book XXVII, Leu upon Punishments, paragraphs III-VII, in part.

statements which may be made. When they have examined and fully made up their minds on those, let them adjust the case to one of the five punishments. If the five punishments do not meet it, let them adjust it to one of the five redemption-fines; and if these again are not sufficient for it, let them reckon it among the five cases of error.

"In settling the five cases of error, there are evils to be guarded against;—being warped by the influence of power, or by private grudge, or by female solicitation, or by bribes, or by solicitations. Where such things are, the offence becomes equal to the crime before the judges. Do you carefully examine, and prove yourselves equal to every difficulty.

"When there are doubts as to the infliction of any of the five punishments, that infliction should be forborne. When there are doubts as to the infliction of any of the five fines, it should be forborne. Do you examine carefully, and overcome every difficulty. When you have examined, and many things appear clear, yet form a judgment from studying the appearance of the parties. If you find nothing on examination, do not listen to the case any more. In everything stand in awe of the dread majesty of Heaven. . . .

"Where the crime should incur one of the higher punishments, but there are mitigating circumstances, apply to it the next lower. Where it should incur one of the lower punishments, but there are aggravating circumstances, apply to it the next higher. The light and heavy fines are to be apportioned in the same way by the balance of circumstances. . . .

"When the case is thus concluded, all parties will acknowledge the justice of the sentence; and when it is reported, the sovereign will do the same.

"In sending up reports of cases, they must be full and complete. If a man have been tried on two counts, his two punishments must be recorded. . . .

"Be intelligent and sincere in hearing each side of a case. The right ordering of the people depends on the impartial hearing of

the pleas on both sides;—do not seek for private advantage to yourselves by means of those pleas. Gain got by the decision of cases is no precious acquisition; it is an accumulation of guilt, and will be recompensed with many evils:—you should ever stand in awe of the punishment of Heaven. It is not Heaven that does not deal impartially with men, but that men ruin themselves.”

(2) *The Family Blood-Feud.*<sup>2</sup>

[In Ireland, Saint Patrick is reputed to have forbidden the Kelts, in the fifth century A. D., to pursue the family blood feud, “a life for a life”, and instead to accept a money composition in settlement. In Arabia, in the seventh century A. D., Mohammed is on record as repeatedly enjoining the same reform. These preachments of those two leaders were indeed almost futile; for the blood-feud prevailed for centuries later, among both Kelts and Arabs, and is still observed as a duty and a right in some Bedouin tribes. But in China, even in the classic period of enlightenment supposed to be represented by King Muh’s charge above quoted, the fulfilment of the family-blood feud was still deemed to be a duty, and was even sanctioned by Confucius. Of the world’s highly developed races, it was the Kelts, the Semites, and the Chinese who have exhibited the longest and most intense persistence of clan and family cohesion; and the blood-feud seems to be inseparable from this type of social life.

The first of the following passages dates presumably in the earlier Chow period; the second one is attributed to Confucius.]

(The Li Ki, book Khu Li, sect. I, part V, par. 10) With the enemy who has slain his father, one should not live under the same heaven. With the enemy who has slain his brother, one should never have his sword to seek (to deal vengeance). With the enemy who has slain his intimate friend, one should not live in the same State (without seeking to slay him).

2. From *The Sacred Books of the East*, edited F. Max Müller, vol. XXVII, Oxford, Clarendon Press, 1885: “The Sacred Books of China, Texts of Confucianism:” Part II, “The Li Ki (Collection of Treatises on the Rules of Propriety or Ceremonial Usages)”, translated by James Legge, book I, Khu Li, sect. I, part V, paragraph 10, page 92; and book II, Than Kung, sect. I, part II, paragraph 24, page 140.

(The Li Ki, book Than Kung, sect. I, part II, par. 24:) Sze-hsia [having in mind the passage from the Khu Li] asked Confucius, saying, “How should (a son) conduct himself with reference to the man who has killed his father or mother?” The Master said, “He should sleep on straw, with his shield for a pillow; he should not take office; he must be determined not to live with the slayer under the same heaven. If he meet with him in the market-place or the court, he should not have to go back for his weapon, but (instantly) fight with him.”

“Allow me to ask,” said (the other), “how one should do with reference to the man who has slain his brother?” “He may take office,” was the reply, “but not in the same State with the slayer; if he be sent on a mission by his ruler’s orders, though he may then meet with the man, he should not fight with him.”

“And how should one do,” continued Sze-hsia, “in the case of a man who has slain one of his paternal cousins?” Confucius said, “He should not take the lead (in the avenging). If he whom it chiefly concerns is able to do that, he should support him from behind, with his weapon in his hand.”

(3) *Confucius as a Judge.*<sup>3</sup>

[Confucius in his checkered peripatetic career, serving rulers successively in several provinces, often acted in the capacity of judge, though very little has been handed down in record of his experiences. A notable saying, valuable for all posterity, was his comment in praise of conciliation (The Great Learning, par. IV): “I decide, as all judges have to do, the lawsuits brought before me; But the best thing would be if we could only persuade people not to resort to lawsuits!”

3. Passage (a) is from the Shuo-yüan by Liu Ksiang, a famous historian of the first century B. C. Passage (b) is from the “Ch’un-ch’iu fan-lu”, by the Confucian scholar Tung Chung-shu, of the second century B. C. Both passages, hitherto not put into English, were found and translated for the present work by Dr. Arthur W. Hummel, the learned Chief of the Division of Orientalia in the Library of Congress.—There is a similar passage in the Chia Yü, book II, cited to the present Editor by Cyrus H. Peake, the learned Professor of the Chinese Language in Columbia University, and bibliographer of Chinese legal literature.

The following two brief passages show him consulting public sentiment before giving judgment—not (it must be inferred) on the facts in the case, but on the particular punishment to be awarded; for most of the passages about law in Chinese annals are concerned with the kind and degree of punishment:]

(a) When Confucius was Chief Justice of Lu [his native State] and heard lawsuits, he insisted on deciding all cases in the presence of the people. After the spectators had all deferentially risen, he would enter the court room and say, "You sir, what do you think about the case?" The man questioned would then give his opinion. Confucius would then turn to another and say, "Mr. So-and-so, what do you think about it?" He would reply, "I think it should be decided just as the other man said."

Are we to assume from this that it was necessary for the Master to follow strictly what those gentlemen said; and did a man of his great learning have to wait for their say-so before he could decide on a case? The answer is that he embodied in his person the conciliatory demeanor of the superior man. In his utterances he was deferential to others, and shared his opinions with them. He would not presume to say that he alone was right.

(b) When Confucius was Chief Justice in Lu [his native State], he decided criminal cases with the utmost fairness. He did not venture to rely on his personal opinions alone, but took into account those of the public. Therefore persons who were given the death penalty died without resentment, and those who were allowed to live did so without repining.

## 50. Some Leading Cases of Famous Old Magistrates.<sup>1</sup>

[In Chinese tradition, the ideal trial Magistrate is one whose combination of shrewd intuition and personal experience enables

1. From *Herbert Allen Giles*, "Historic China and Other Sketches", pp. 92, 143, 175; London, Thos. De LaRue & Co., 1882. Mr. Giles was for many years a British Consul in China, and then Professor of Chinese in the University of Cambridge, England. In 1902 he was Lecturer on the Dean Lung Foundation in Columbia University. For the loan of this rare work the present Editor is indebted to the Columbia University Library.

him to read the heart of the witnesses and to discriminate between guilt and innocence without the aid of a formal system of proof. Such skill in understanding human nature has always in the Orient commanded the wonder and admiration of the multitude.

Collections of leading cases of famous judges are a well-known feature of Chinese legal literature. The two best known of these judges were Pao Hsiao-Su, who lived in the Sung dynasty—say the 1100s—and Lan Lu-Chow, who was born A. D. 1680. Two of their cases are as follows:]

### (1) *The Case of the Lover and the Priest* (from the memoirs of Judge Pao).

There lived, at a certain place in the province of Hupei, a graduate named Hsu Yen-chung, just eighteen years of age, and a handsome, clever-looking fellow. In the house opposite resided a pork-butcher, and he had a pretty daughter named Shu-nü, about seventeen, who spent a great deal of her time embroidering at an upper window which overlooked the street. One day she noticed Hsü passing by, and the two young people at once fell in love with each other. As time went on they began to laugh and talk together, and one evening Hsü, with the young lady's consent, planted a ladder against the wall, and got up into her room. Shu-nü then told him that for the future she had arranged a method by which he might climb up and down with less risk of detection, explaining that every night a piece of cloth stretched over a roller would be found hanging out of the window, and that if he took hold of the end below, she would pull him up.

Hsü was delighted with this plan, which they carried on for some six months, quite unsuspected by the pork-butcher, though not altogether so by the neighbours.

At length, it chanced that one evening when Hsü had gone to a wine-party, and did not visit Shu-nü as usual, a Buddhist priest who was calling for alms along the street saw the cloth hanging out

A translation from another version of the first case here given, by the eminent French sinologue, Léon de Rosny, was published in the "Revue Orientale et Américaine", N.S. Vol. IV, 1880, No. 14, p. 165, "Les causes célèbres de la Chine", translated from "Loung-Tou-Koung-Ngan".

of window, and thinking that it had been hung out to dry and had been forgotten by the family, he determined to walk off with it. With this view, he stopped beating his wooden fish,<sup>2</sup> and crossing quietly over, seized the cloth; upon which he immediately felt himself being raised in the air by some one above. Suspecting what this meant, he allowed himself to be pulled up until he stood in the presence of Shu-nü.

No sooner had the latter found out who he was, than without waiting to listen to his protestations, she bade the dirty bald-pate<sup>3</sup> be gone, offering him a hair-pin as a bribe to expedite his movements. The priest, however, declared that she had pulled him up, and that in consequence he intended to stay; at which Shu-nü began to call out "Thieves!" at the top of her voice. The pork-butcher and his wife were then fast asleep; but the priest, fearing lest he should be discovered, drew a knife and killed the girl on the spot, escaping from the room as soon as he had possessed himself of her hair-pins, finger-rings, and other ornaments.

On the following day, as Shu-nü did not appear at breakfast, her mother went to see what was the matter, and found her lying murdered on the floor. Nor had the parents the least suspicion on the subject, until one of their neighbours, who was on bad terms with Hsü, mentioned to the pork-butcher that his daughter had been acquainted with Hsü for six months past, and hinted that as Hsü had been to a wine-party on that very evening, he might have committed the murder in a fit of drunkenness. The pork-butcher accordingly proceeded to file a charge before Judge Pao, of whose great judicial capacity he was well aware, in these terms:—

"In a matter of violence resulting in murder. Whereas a certain evil-disposed graduate, named Hsü Yen-chung, has been striving by numerous artifices to carry out iniquitous designs upon your petitioner's daughter, and last night went so far as to enter her room in a state of intoxication and stab her to death with a knife, subsequently making off with her head-ornaments, etc., in proof of

2. A hollow instrument made in that shape, because a fish sleeps with its eyes open, and is therefore a good emblem of vigilance.

3. Buddhist priests shave the entire head.

which the neighbours can be called to bear witness; and whereas such behaviour is highly discreditable to the position he occupies, amounting in fact to making as light of the laws and statutes as of a goose's feather, and to dragging the great social relationships and observances in the dust, therefore, your petitioner hastens to file this charge, praying that the murderer may be decreed to pay the penalty with his life."<sup>4</sup>

The above document having been admitted by Judge Pao, runners were forthwith despatched to arrest prosecutor, accused, and witnesses; and when these were duly assembled, the proceedings were opened by an examination of the pork-butcher's neighbours, who deposed that the deceased had to their knowledge been carrying on an intrigue with Hsü Yen-chung for the past six months, the same being quite unknown to her parents, and that unless it was through this that she met her death, they could not say how it was, the affair having happened in the dead of night.

At this Hsü interposed, and said, "In the face of such general testimony, I have no intention of denying the intrigue, which I fully admit, and for which I am prepared to suffer punishment; but I totally deny having taken any part in the murder." "Your Honour," cried the pork-butcher, "he is admitting the lesser only to escape the greater crime. As no one else ever went into my daughter's room, it follows that he must have killed her, possibly because she may have tried to forbid his visits. And now, the reckless young fellow has no more thought for the poor girl, so that unless your Honour deals severely with him, he will never acknowledge his guilt."

The judge looked at Hsü, and noticing by his handsome face and quiet manner that he did not look at all like a murderer, proceeded to ask him if during the time that he had been acquainted with the deceased he had seen any other persons passing along the street at night. "Not until this month," replied Hsü, "when a begging priest used to go by sometimes, beating his wooden fish." At this, Judge Pao reflected a moment, and then, flying into a

4. A fair specimen of an ordinary Chinese 'petition' in a criminal case.

great rage, cried out, "It was you who killed her, and you will have to die for it! Do you admit the justice of this sentence?" Hsü Yen-chung, being only a young man, was frightened out of his life, and immediately admitted that his sentence was just; upon which he received twenty blows and was committed to prison, after formally signing his confession of guilt.<sup>5</sup>

Judge Pao now summoned two of his runners, and having elicited from them certain details as to the priest mentioned by Hsü, gave them instructions how to act, promising to reward them well in case of a successful result. So it happened that the same night, as the priest, after going his rounds, was returning to the temple in which he lived, near a bridge, he heard from beneath the bridge the noise of three devils, one of which was crying out, "Up!" and another "Down!" while the third was sobbing in a low and piteous tone. The priest, in a great fright, sat down on the bridge, and began to repeat the name of Amida Buddha, when one of the devils, speaking in a woman's voice broken by sobs, called out, "Oh, Ming-hsiu, Ming-hsiu<sup>6</sup>, why did you cut me off before my time, and steal my hair-pins and head-ornaments? I have laid the case before the Judge of the Infernal Regions, who has sent two devils with me to get your life, and here are you praying to Amida Buddha to intercede in your behalf! Rather get some money and silk for me, and make a present to these devils, if you want to hush the matter up privately. Otherwise, if I appeal to God<sup>7</sup> again, your life will certainly be forfeited, and not all the Buddhas in creation will be able to save you." At this the priest grasped his rosary, and joining his hands in an attitude of prayer, replied, "I could not help it; I was afraid some one would come and catch me, and so, without thinking, I took your life. I still have your ornaments, and to-morrow I will sell them and buy for you paper-money and silk; besides which, I will read masses for your soul and get you

5. Without which no criminal record of the kind was complete, and, theoretically, no criminal can be executed.

6. The priest's religious designation.

7. The Supreme Being of the ancient Chinese, who is often, as here, mixed up with Buddhist and other deities.

safe through purgatory. Do not, I pray you, complain of me to God." Here the female devil burst out crying, and the two other devils began to roar out, mingling their groans with the voice of the priest.

He was repeating a *sutra* [prayer] and promising to say masses for Shu-nü's soul, when suddenly the two runners came out and clapped an iron chain over the priest's neck. The latter was terrified, thinking they were devils, but one of them told him they were only runners sent by Judge Pao to take him prisoner; whereupon he became quite beside himself with fear, and could only entreat them to spare him "for the love of Buddha." "A pretty specimen of a Buddha you are," replied the runners, as they tightened up his chain and led him away, one of them picking up his stole and praying-mat before they left the spot.

Now, all this plan of the devils under the bridge had been devised by the judge, who had told his two runners to take a girl with them to play the part of Shu-nü; and the next day the whole story was told in open court, whereupon a present of money was made to the girl and to the runners from the public funds, and the ornaments which had been recovered from the sleeve of the priest's robe were regularly identified by Shu-nü's father. Ming-hsiu was now obliged to confess his guilt, and Judge Pao, turning to Hsü Yen-chung, addressed him as follows:—

"The murderer of the deceased girl was this bald-headed scoundrel who now stands before us, and he will pay the penalty with his life. You, too, a graduate of the empire, deserve for your connection with this affair to be deprived of your graduate's gown. There is, however, a saving clause for you. On condition that you acknowledge the deceased Shu-nü as your lawful wife, and bury her, and worship at her tomb as such, promising never to marry any other woman, then I will forbear to unfrock you as I ought, and your career will still be open before you. Do you accept this condition?" "Your Honour," replied Hsü, "I readily accept the condition offered; the more so that before Shu-nü's death I had already promised to marry her as soon as I should have taken my second degree. I will therefore do all your Honour requires



of me; as to my literary degree, and whether I am to retain it or not, that is for your Honour to decide." "Your heart," said Judge Pao, in conclusion, "beats, I am pleased to observe, in accordance with the eternal principles of Right. I shall make it my business to forward your prospects in life, and will communicate accordingly with the authorities of the Educational Department."

(2) *The Case of the Drowned Beggar's Corpse*  
(from the memoirs of Judge Lan).

[From the Chinese Editor's Introduction:

'My master's judicial capacity was of a remarkably high order, as though the mantle of Pao Hsiao-su had descended upon him. In very difficult cases he would investigate dispassionately and calmly, appearing to possess some unusual method for worming out the truth; so that the most crafty lawyers and the most experienced scoundrels, whom no logic could entangle and no pains intimidate, upon being brought before Lu-chow, found themselves deserted by their former cunning, and confessed readily without waiting for the application of torture. I, indeed, have often wondered how it is that torture is brought into requisition so much in judicial investigations. For, under the influence of the "three wooden instruments,"<sup>8</sup> what evidence is there which cannot be elicited?—to say nothing of the danger of a mistake and the unutterable injury thus inflicted upon the departed spirit in the realms below. Now Lu-chow, in investigating and deciding cases, was fearful only lest his people should not obtain a full and fair hearing; he, therefore, argued each point with them quietly and kindly, until they were thoroughly committed to a certain position, with no possibility of backing out, and then he decided the case upon its merits as thus set forth. By such means, those who were bamboosed had no cause for complaint, while those who were condemned to die, died without resenting their sentence; the people were unable to deceive him, and they did not even venture to make the attempt. Thus did he carry out the Confucian doctrine of respecting popular feeling;<sup>9</sup>

8. The cangue, the finger-squeezer, and the ankle-squeezer.

9. Enunciated in the Great Learning, or Book of Wisdom, a politico-ethical treatise of the Confucian period, attributed by some to Confucius himself.

and, were all judicial officers to decide cases in the same careful and impartial manner, there would not be a single injured suitor under the canopy of heaven.']

A Dead Beggar gets a Wife and Son.

The wife of a man named Cheng once came before me to complain that her husband had been driven to commit suicide. She said he had been beadle of a certain village, and that having had some trouble in collecting taxes from a man named Hsiao, who withheld his title-deed and refused to listen to argument, the latter, on the 13th day of the moon, had collected a number of friends and wrecked the house, beating her husband so severely, that in despair, he threw himself into the river and was drowned. She further indicated the spot at which the body was to be found; and, accordingly, though suspecting in my heart the truth of her story, I had no alternative but to hold the usual inquest. Her son got the corpse on board a boat and brought it along, and I proceeded forthwith to make an examination. No wounds were visible upon it; still, the finger nails were full of mud and sand—a sure proof of suicide<sup>10</sup> by drowning—though, at the same time, I felt confident that the persons accused, who were all honestly engaged in trade, would not thus causelessly set upon and beat another man.

Further, deceased had been beadle of the place, and those now arraigned on this charge of murder had frequently complained on previous occasions, to my predecessor in office, of the depredations of thieves, with a view to recovering their losses from the beadle; and I, when I took over the seals, had gone so far as to fix a limit within which the missing articles were to be restored, but without success.

Now, there was this story of the attack and suicide; but the flesh on the face of the dead man was too far decomposed to admit of his identification, and I also thought it rather strange that no one should know anything about an affair which had happened eight days previously, and that there should have been such delay in

10. As distinguished from a murder, when the nails would be free from mud.

making the charge. At the same time, as the inquest was held only eight days after death, it remained to be shown why the body should be then so far gone in decomposition as if the man had been dead for a fortnight and more.

On my putting this last question to the prosecutrix, her son replied that bodies naturally decompose more rapidly in water than otherwise; and as for the accused, they none of them seemed to have a word to say for themselves, while mother and son stood there jabbering away with their hempen garments and mourning staves, the one bemoaning the loss of her husband, the other of his father, in such affecting tones as would have drawn tears from the bystanders, even had they been of iron or of stone. My own conviction was, however, unfavourable to their case, and I bade them go along home and bury the body themselves.

At this there was a general expression of astonishment; and then I called the accused and said to them: "Cheng is not dead; can you not manage to arrest him?" They all declared they "didn't know;" whereupon I railed at them saying: "What! you can't find out the affairs of those who live in the same village, and draw from the same well as yourselves? This indolent, careless behaviour of yours is perfectly amazing. It's all very well to be callous when other people are concerned; but now that you stand charged with this murder and your own necks are in peril, it being my duty to commit you to prison to pay the penalty, do you mean to tell me you are willing to take the consequences?" The accused men then burst into tears, and implored me to save them; to which I replied: "That is no use. Here's this man Cheng, who was formerly an accomplice of thieves, alarmed by my appointment to office, disappears from the scene. Now, your cities of refuge are confined to some half-dozen or so; and if you separate and go to them in search of the missing man, I have no doubt but that you will find him."

Three days passed away, when back one of them came with Cheng, whom he had caught at the city of Hui-lai. They were followed by a large crowd of several thousand persons, who clapped their hands and seemed much amused; and among them were the

mother and son, overwhelmed with shame, and grovelling in the dust before me. I made the latter tell me the name of their legal adviser who had egged them on to act thus, and punished all three according to law, to the great delight of the inhabitants of the district.

As for the corpse, it was that of a drowned beggar, and no one came forward to claim it. However, as its pretended wife and son had worn sackcloth and carried funeral staves, interring it with every outward demonstration of respect, the beggar's soul must have had a good laugh over the whole affair down in the realms below!

# 51. Trial of the Portuguese Merchants accused of Piracy, A.D. 1560.<sup>1</sup>

## *Fair Treatment for the Foreigners.*

[Perera was a Portuguese merchant, in Macao (near Canton) about A. D. 1560. Perera's party had been mistaken for pirates; were arrested; resisted; and some Chinese deaths resulted. The strangers were then charged, first with piracy, and secondly with resisting officers. But their true character was vindicated at the trial; the officers who unjustly arrested them as pirates were disgraced; and the individuals who had done the killing were found guilty of homicide. Perera thus comments on the kind of justice his party received:]

I shall have occasion to speake of a certaine order of gentlemen that are called Louteas. I wil first therefore expound what this word signifieth. Loutea is as much to say in our language 'Sir' . . . . . Such Louteas as doe serve their prince in weightie matters for justice, are created after trial made of their learning.

1. From *Galeotto Perera*, "Certain Reports of the Province of China", etc., reprinted in Hakluyt's "Principal Navigations, Voyages, etc.", MacLehose ed., 1904, vol. V, pp. 300-309.

A fuller account of the same trial is given in *Friar Gaspar da Cruz*, "A Treatise of China and the adjoining Regions", reprinted in Samuel Purchas, "Purchas His Pilgrimes", vol. XI, chap. X, p. 547. In the extracts here given the passage beginning "As soon as the King was informed" is taken from Friar Gaspar's account.

. . . . . Now will I speake of the maner which the Chineans doe observe in doing of justice; that it may be knowen how farre these Gentiles do herein exceed many Christians, that be more bounden then they to deale justly and in trueth . . . . . In the principall Cities of the shires be foure chiefe Louteas, before whom are brought all matters of the inferiour townes, throughout the whole realme. Divers other Louteas have the managing of justice. . . . . These Louteas do use great diligence in the apprehending of theeves, so that it is a wonder to see a theefe escape away in any city, towne or village. . . . .

The Louteas observe moreover this: when any man is brought before them to be examined, they aske him openly in the hearing of as many as be present, be the offence never so great; thus did they also behave themselves with us. For this cause amongst them can there be no false witsnesse, as dayly amongst us it falleth out. This good commeth thereof, that many being alwayes about the Judge to heare the evidence, and beare witsnesse, the processe cannot be falsified, as it happeneth sometimes with us. . . . .

Againe, these Louteas, as great as they be, notwithstanding the multitude of notaries they have, not trusting any others, do write all great processes and matters of importance themselves. Moreover one vertue they have worthy of great praise, and that is, being men so wel regarded and accompted as though they were princes, yet they be patient above measure in giving audience. We poore strangers brought before them might say what we would, as all to be lyes and fallaces that they did write, ne did we stand before them with the usuall ceremonies of that countrey; yet did they beare with us so patiently, that they caused us to wonder, we knowing specially how litle any advocate or Judge is wont in our countrey to beare with us. For wheresoever in any towne of Christendome should be accused unknownen men as we were, I know not what end the very innocents' cause would have. But we, in a heathen countrey, having our great enemies two of the chiefest men in the whole towne, wanting an interpreter, ignorant of that countrey language, did in the end see our great adversaries cast into prison for our sake, and deprived of their offices and honour for not doing

justice,—yea not to escape death: for, as the rumour goeth, they shal be beheaded.

As soone as the King was informed of all above said, hee dispatched presently from the Court a Quinchay [high magistrate], (of whom we spake before, that is to say, wearing a plate of gold). And with him he sent other two men of great authoritie also, of the which the one had been Panchasi, the other Anchasi; these two as Inquisitors and Examiners of this matter . . . . . The prisoners were presently brought, and were presented to the one of them. . . . .

They examined them in this order: The accused were first brought and examined by one of these officers, and they carried them to the other to bee examined againe. And while the other was re-examining the accused, the accusers were brought to him that examined first. And as well the accused as the accusers were all examined by both the officers, that afterward they both seeing the confessions of the one and the other, they might see if they did agree. And first they examined every one by himselfe. Afterward they examined them altogether, for to see if the one did contrary the other, or did contend and reprehend one another, that so by little and little they might gather the truth of the case. . . . .

The Louthias did always shew themselves glad to heare the Portugals in their defence, who alleadged in their defence, that if they [the Magistrates] would know who they were, and how they were merchants, and not theeves, they should send to enquire of them along the coast of Chincheo, that there they should know the truth, which they might know of the merchants of the countrey, with whom a great many yeares agoe they had dealt. . . . .

Having this information of the Portugals, presently with the opinion of the Quinchay and the other officers, they went to Chincheo, both of them, to enquire of the trueth of that which the Portugals had told them; and discovering there the truth of the Portugals matter, and the lies of the Luthissi and of the Aitao [enemies of the Portugals], they dispatched presently a post; wherein they commanded to put the Luthissi and the Aitao in

prison, and in good safeguard. Wherefore from thence forward all men began to favour them [the Portugals] very much. . . .

After the Louthias returned from Chincheo, they commanded to bring the Portugals before them, and comforted them very much, shewing them great good-will, and saying to them, that they knew already they were no thieves, but were honest men: and they examined againe as well they as their adversaries, to see if they contradicted themselves in any thing of that which before they had spoken. . . .

All the examinations and diligences necessarie in this businesse ended, the Quinchay willing to depart for the Court [of the King] with his companie, would first see the Portugals, and give a sight of himselfe to the citie. The sight was of great majestie in the manner hee went abroad in the citie; for he went accompanied with all the great men of it, and with many men in armes and many ancients displayed and very faire, and with many trumpets and kettle-drummes, and many other things which in such pompes are used. And accompanied in this manner, hee went to certaine noble and gallant houses. And all the great men taking their leave of him, hee commanded the Portygals to come neere him, and after a few words he dismissed them: for this was not but onely to see them. Before these Louthias departed, they commanded the Louthias of the countrey, and the jaylors, that all of them should favour the Portugals, and give them good entertaynment, and should command to give them all things necesarie for their persons. . . .

The Portugals that were freed by the sentence, when they carried them whither the King commanded, found by the way all things necessary in great abundance, in the houses above-said that the King had in every towne for the Louthias when they travell.

## 52. Trial of an Englishman for an Accidental Homicide, A.D. 1808.<sup>1</sup>

### *Discharged but Deported.*

[The following report of a homicide case of a century and a half ago illustrates the method of investigation and the process of appeal, as well as the principle of law involved; the original is a communication (dated 1808) from the Mayor of the port of Canton, transmitting to the Chinese Merchants' Guild a copy of the Supreme Court's decision:]

[Mayor's Letter.] I have received information from His Excellency the viceroy to the following effect:

[Viceroy's Letter.] "On the 26th of the first moon of the 13th year of [the Emperor] Kia King, I received the following dispatch from the Supreme Criminal Tribunal at Pekin, relating to a case that had been tried in this province:

[Supreme Court's Opinion.] "A decision having taken place upon a case which we had laid before his Imperial Majesty for ratification, it is now fit and necessary that we should communicate the same to your excellency, as viceroy of Kwang-Tung and Kwang-See, to the end that the same may be duly carried into effect under your excellency's direction.

"His Majesty's Inner Council having, in the first instance, issued a transcript of the report of the viceroy of Kwang-Tung and Kwang-See, stating his investigation of the case of a foreigner, Edward Sheen, opening a window-shutter in an upper story, and dropping a stick so as to hit and occasion the death of Leao-a-teng, a native of this empire; His Majesty was pleased on the 8th of the 11th moon of the 12th year, to direct that our tribunal should revise the same and pronounce judgment thereon.—In obedience to orders, we accordingly, on the 10th day of the moon, took the said transcript into consideration; and we found that the viceroy's report was grounded, in the first instance, on a report of the magistrate of Nan-hay-Sien, a district of Canton, which was to the following effect:

1. From Sir G. T. Staunton, "Ta Tsing Leu Lee, being the Fundamental Laws" etc., Appendix XI, p. 521 (London, 1810).

[Magistrate's Report.] "On the 18th day of the first moon of the present year, Leao-a-teng, a native of the district Pun-yu-Sien, went with his wife's brother Chao-a-Sse, to buy goods in a street within the said district, called She-san-hang, and happened to pass along the stone pavement under a warehouse called Fung-tay-hong. At the same time an Englishman named Edward Sheen, who was in the upper story of the said warehouse, in attempting to open the window, slipped his hand and dropped a stick, which, Leao-a-teng not expecting, could not avoid, and was therefore struck therewith on the left temple, so that he fell to the ground. Chao-a-Sse acquainted Leao-a-lun, the brother of Leao-a-teng, with the accident, who being thus informed of the particulars thereof, came and assisted the said Leao-a-teng to return to his home, and procured him medical assistance, which however had no effect, and the wounded man expired on the evening of the following day, the 19th of the moon. The brother of the deceased then reported the case to the head-man of the district; and by him, information was laid at the tribunal of Nan-hay-Sien, where the witnesses of the fact having been, in consequence, assembled and examined, the chief of the said [English] nation was called upon to deliver up the said criminal Edward Sheen, for examination and trial."

[Supreme Court Opinion, resumed.] "The viceroy proceeded to state, that repeated orders were, in consequence, issued to the Hong merchants on the subject, and through them to the chief of the said nation; in reply to which it was alleged, that the said criminal was sick of an ague and fever, and undergoing medical treatment for his recovery: at length, after repeated applications, it was reported that he had recovered from his sickness, whereupon the magistrates of the district confronted the criminal with the relations of the deceased, and having finished the investigation in due form, referred the consideration of the proceedings to the chief judge, by whom the same process was renewed, and the result finally transmitted to the vice-regal office. His excellency having concluded the enquiry, by personally and strictly examining into the affair himself, ascertained that:

[Viceroy's Report, quoted.] "Edward Sheen is a native of England, engaged for hire to perform the duty of a seaman, on

board the ship of Captain Buchanan, a merchant of the same nation. The said ship having been laden with a cargo of goods for trade, in the said kingdom of England, had arrived at the port of Canton and anchored in the reach of Whampoa, in the course of the 12th moon of the 11th year of [the Emperor] Kia King, after which the cargo was landed, and deposited in a warehouse or factory called Fung-tay-hong in the suburbs of the city of Canton. Edward Sheen had immediately thereupon accompanied Captain Buchanan and others to the upper story of the said warehouse or factory, in order to dwell therein, until, the returning cargo having been received, the period of departure should arrive. This upper story was also contiguous to and overlooked the street and pathway, towards which window was opened with moveable shutters. It happened also, that Leao-a-teng, a native of China, accompanied by his wife's brother Chao-a-Sse, went to the street called She-san-hong, to buy goods; and passing at the same moment under the said upper story, was struck and wounded by the end of the stick falling, as aforesaid, upon his left temple; and he thereupon fell to the ground. Chao-a-Sse acquainted Leao-a-lun, the brother of Leao-a-teng, with the accident, who, upon being informed thereof, immediately came and assisted Leao-a-teng to return to his home; and afterwards procured him medical assistance; all which, however, proved of no avail; and the wounded man died on the evening of the following day, the 19th of the moon. Now, the aforesaid criminal, Edward Sheen, having been repeatedly examined, has acknowledged the truth of all the facts here stated, without any reservation.—Consequently, in this case, there is no appeal against the conviction of this offender, Edward Sheen; who, having been proved guilty of accidental homicide, may be sentenced to pay the usual fine, to redeem himself from the punishment of death by strangulation."

[Supreme Court Opinion, resumed.] "The foregoing being the substance of the report of the viceroy to his Imperial Majesty, we have deliberated thereon, and have ascertained that, according to the preliminary book of the penal code, all persons from foreign parts, committing offences, shall undergo trial and receive sentence

according to the laws of the empire. Moreover, we find it declared in the same code, that any person, accidentally killing another, shall be allowed to redeem himself from punishment, by the payment of a fine. Lastly, we find, that in the 8th year of Kien-Lung [1743] it was ordered, in reply to the address of the viceroy of Canton then in office, that thenceforward, in all cases of offences by contrivance, design, or in affrays happening between foreigners and natives, whereby such foreigners are liable, according to law, to suffer death by being strangled or beheaded, the magistrate of the district shall receive the proofs and evidence thereof, at the period of the preliminary investigation, and after having fully and distinctly inquired into the reality of the circumstances, report the result to the viceroy and sub-viceroy, who are thereupon strictly to repeat and revise the investigation. If the determination of the inferior courts, upon the alleged facts, and upon the application of the laws, is found to have been just and accurate, the magistrate of the district shall lastly receive orders to proceed, in conjunction with the chief of the nation, to take the offender to execution, according to his sentence. In all other instances of offences committed under what the laws declare to be palliating circumstances, and which are therefore not capitally punishable, the offender shall be sent away to be punished by his countrymen in his own country.

"The case of the Englishman, Edward Sheen, opening a window-shutter in an upper story, and the wooden stick which supported it slipping and falling down so as accidentally to hit Leao-a-teng, a native who was passing by, and by striking him to occasion his death, appears to be, in truth, one of those acts, of the consequences of which neither sight, hearing or reflection could have given a previous warning; there was therefore, no intention to injure, and the case is evidently agreeable to the construction stated in the commentary upon the law of accidental homicide. The said Edward Sheen ought therefore, conformably to the provisional sentence submitted by the viceroy to his Majesty, to be allowed to redeem himself from the punishment of death by strangulation [to which he would otherwise have been liable, by the law against homicide by blows], by the payment of a fine of 12 leang 4 sen and

2 lee [about 41£. 3s. sterling], to the relations of the deceased, to defray the expenses of burial; and then be dismissed to be dealt with in an orderly manner in his own country.

"We thus respectfully laid before his Imperial Majesty, our deliberate judgment upon this case, with the considerations whereupon it is founded, and humbly solicited a declaration of his Majesty's pleasure regarding the same.

"On the 17th day of the 10th moon of the 12th year [January 1808] the address was laid before his Majesty, and received his Majesty's answer in these words: 'We ratify your judgment.'

[Viceroy's Letter, resumed.] "The above communication of the Supreme Criminal Court, having reached the vice-regal office, I, in the first instance, directed the provincial judge to attend to the strict execution of the Imperial decree, by forthwith taking the said Edward Sheen and delivering him to the chief of his nation, in order to his being sent back to be governed in an orderly manner in his own country; the usual fine being at the same time duly recovered, for the re-imbursement of the relatives of the deceased for the expenses of his interment: the exact time of dismissal of the said foreigner, and of the reimbursement of the said relatives, are to be duly ascertained and reported to me; but I think fit, moreover, to communicate these things to your excellency, that you likewise may co-operate in attending to the due execution thereof."

[Mayor's Letter, resumed.] His excellency the viceroy's communication having been transmitted to me, as Mayor, at my office, I determine to make it known to you also, Hong merchants, that you may, agreeably to these my orders, attend to the due execution of all things therein required. May you respectfully conform to these orders.

The 7th of the 2d moon of the 13th year of the Emperor Kia-King [February, 1808].

*Chapter 11*  
*INDIA*

## INDIA

## Chapter 11

53. *A Prince Sues a King for Refusing his Daughter's Hand in Marriage, A. D. 800.*  
*But the Prince Loses, for the King's Word is Indisputable.*
54. *Procedure in a Maratha Popular Court, A. D. 1475.*  
*The Ordeal of the Boiling Butter-Pot.*
55. *The Speedy Justice of the Great Mogul, A. D. 1640.*  
*Indian and European Justice Contrasted.*
56. *The King's Audience of Justice in Old Burma, A. D. 1710.*  
*Chastisement for a Groundless Appeal.*
57. *A Day in Court in a Modern Mountain Village.*  
*"Justice! Justice!" is the Constant Prayer.*
58. *"Sitting Dharna."*  
*Self Sacrifice to Compel a Wrongdoer to Make Redress.*
59. *Trial Procedure Among the Khasi Tribe in Assam.*  
*Judge and Jury eat the Fine, i. e. a Pig.*
60. *The Ordeal of the Sacred Tree.*  
*The Tree's Embrace Frees or Condemns.*
61. *Civil Justice in the Modern Kingdom of Nepal.*  
*A Water-Ordeal well Fortified against Fraud.*

[Introductory. India was the birthplace of two legal systems that still survive,—the Brahman and the Buddhist. The latter was an offshoot of the former; for both look back for their foundation to the commands of Manu, the legendary religious law-giver (who may have lived about B. C. 1500). The Buddhist religious law has long since died out in India. But in compensation it has spread abroad and influenced all the adjacent countries,—Burma, Siam, Nepal, Tibet, China, Mongolia.<sup>1</sup>

But though the Brahman system of the Hindus had come to dominate in India, by about A. D. 1000, it was far from representing the universal, or perhaps even the general, usage in trial-methods, even in the domains of the princes of that race and religion. One great reason was that the elaborate legal treatises setting forth the procedural rules were the product of chambered jurists, expounding a logically ideal system, and it is not certain how surely or widely they were applied in practice. But a perhaps greater reason is that India has always been a congeries of varied race-stocks, each having fixed customs of its own, which might vary from province to province and even from village to village. India has been called "a great museum of races"; it uses some twenty-five principal languages, with over three hundred dialects; and politically it is still composed of some six hundred semi-independent native States. Moreover, in its three thousand years of history, it has been six times entered and dominated, in succession, by immigrant alien race-stocks,—Indo-Aryan, Persian, Greek, Turk, Mongol, and English. So that no one system of law ever did obtain over its vast area, but only a conglomeration of local or racial institutions.

The following passages illustrate (though only in part) the variety of trial-methods naturally to be expected in its past history.

1. For an extended account of the developed Brahman and Buddhist legal systems, see Chapter V in the present writer's "Panorama of the World's Legal Systems", West Publishing Co., St. Paul, 1928 and 1936.



The first passage is one of the rare available accounts of Brahman justice in the period before the Islamic invasions from the North. The second represents the customary law in a Brahmanic local community of the late Middle Ages. The next two exhibit the judicial methods of two royal rulers,—one, the Islamic Great Mogul Emperor, the other, the Buddhist king of Burma. The remaining five passages describe variant methods of trial still obtaining in different regions, as reported by foreign observers in modern times.]

53. A Prince sues a King for Refusing to give his Daughter's Hand in Marriage, A.D. 800.<sup>1</sup>

*But the Prince Loses, for the King's Word is Indisputable.*

[Here is a very interesting report of a civil suit in a court of law as described in the famous narrative fiction by Budhasvamin, who is believed to have lived about the 8th or 9th century. . . . The work, in the 20th chapter, refers to a law suit by a rejected suitor for specific performance of a contract by a father to marry his daughter to the suitor.

Prince Narvahanadatta, the hero of this metrical romance, marries Ajinavati, daughter of Chanda-simha, a king of the Vidyadharas. Now, it so happened that, long before this alliance, one Vikacika, a Vidyadhara, had sued for the hand of the princess. King Chanda-simha had evaded the proposal on the ground that the girl was then too young to marry. But Vikacika spread the rumour that she was betrothed to him and could not be lawfully wedded to another. After her marriage, Vikacika challenged Chan-

1. From *O. C. Gangoly*, "Report of a Civil Suit in Ancient India", *Bombay Law Journal*, 1933-34, vol. XI, p. 5.

This narrative of an interesting proceeding of a thousand years ago is taken from a fictional composition, but is believed to represent the procedure of a period for which other historic trial records are rare; the description of procedure in the regular law-treatises being somewhat open to question as merely theoretical.

The passages in brackets are those of the author of the article; the text of the document itself is without brackets. It has been edited in French translation by Felix Lacôte (Paris, 1907), and is translated into English in an essay "On the Gunadya and the Brihatkatha".

da-simha to a duel, and was referred by the latter to a suit in Court. Now the court having jurisdiction in the matter happened to be located at Saptaparna, a place some distance from Champa, and there both the parties travelled, along with Ajinavati and her husband. The presiding judge of the Court was one Vayumukta, who heard the complaint with an assembly of judges or assessors. Ajinavati, who apparently attended the Court with her father, came back and reported to her husband Naravahanadatta that the case did not proceed to the stage of arguments, and that the presiding Judge had thrown out the complaint of Vikacika.

The trial is not an important motif in the story and comes in incidentally, and is reported second-hand through the mouth of Ajinavati. Yet we get some interesting details not available from any other source. Quoted below are the relevant verses, together with free translations thereof:] . . . .

When he heard of the marriage of Ajinavati with Narvahanadatta, Vikacika came back and expostulated with her father: "What is this conduct of yours who pretend to be a person of righteous conduct? After having given your daughter to me, you give her to some other suitor! I must call upon you to do one of these three things, either give me your daughter, or give me a duel, or give me a fight in a law court". To this the King replied, smiling, "Oh you long-lived one! You do not deserve my daughter, nor a duel; you had better go to the law court".

[Having given him this ultimatum, the King with his ministers and retainers adjourned to the City of Saptaparna, the headquarters of the Chief Judge, by the name of Vayumukta.] . . . .

The said Vikacika, on arriving at the court-house, beat the drum, after which the Chief Judge Vayumukta came into the court room accompanied by the other judges and the officers of the judicial assembly.

The Judges asked him, "Why have you beaten the drum?" He (Vikacika) stood before them, without taking a seat, and deposed as follows: "Chanda-simha, after having given me his daughter, in the vicinity of the city, has given her to another suitor; on this point you can enquire from the inhabitants of the whole city."

When my father was called upon to give his rejoinder by the judicial assembly, he answered in a sonorous voice resembling the clouds: "Even if you ask of the inhabitants of our city who have been cited as witnesses by this person, they will unanimously contradict the story of the plaintiff."

After this, Vayumukta, having consulted the other members of the assembly, remarked: "What is the necessity of seeking confirmation of the assertion of this King, who in his respect for righteousness is only a little short of Manu himself? The evidence of a king does not admit of doubts necessitating further enquiries. It must be accepted as direct and incontrovertible testimony. In the circumstances, our decision is that the plaintiff Vikacika has failed to establish his case and has been defeated by the defendant."

[On hearing this adverse judgment the aggrieved and angry plaintiff rushed out of the court room and began to abuse the bench as "unjust, partial, and foolish." . . . .]

It is needless to add that Narvahanadatta, the newly-wed prince, being delighted by listening to this happy report of the result of the trial, from the lips of his bride, duly celebrated the victory "by embroidering the neck of his beloved by a shining garland of autumnal blossoms knit together by his own fingers, hungry with passion."]

#### 54. Procedure in a Maratha Popular Court, A.D. 1475.<sup>1</sup>

##### *The Ordeal of the Boiling Butter Pot.*

[In the times of the Maratha Regime, in northwest India, about Bombay, there were four kinds of institutions which formed part of the judicial machinery of the Maratha Government. The institution which stood at the base of the judicial machinery was the Got Sabha (court). Every village in Maharashtra had a Got Sabha, just as at present every one or two Talukas together have a

1. From *Bhaskar Waman Bhat*, "Judicial Machinery of the Maratha Government", *Bombay Law Journal*, 1927-28, vol. V, pp. 309, 367.

The bracketed passages are from the author's explanatory remarks in the above article. Then follows the record of the trial.

subordinate Judge's court for administering justice. Superior to the Got Sabha and possessing wider powers was the Deshak Sabha, which had powers co-ordinate with those of the Got Sabha to entertain and dispose of any disputes brought to it for being decided. The Nyayadhis or Judge entrusted with a seal and appointed by the King for dispensing justice was superior to these institutions. The King stood at the head of these three, and his authority was supreme. When a dispute was taken to the King for being decided he used to decide it himself, or he used to constitute himself and his eight ministers and Deshaks (i. e. District hereditary officers such as the Deshmukhs and Deshpandes) into a Sabha and leave the decision of the case into its hands. . . . .

Superior to the Got Sabha, as above stated, was the Deshaka Sabha and I propose to describe in this article its constitution and functions. . . . In those days a large number of villages constituted a Pargana. Just as the Patil and Kulkarni were the two important Vitandars [hereditary land-owners] in the village community, similarly the Deshmukh and Deshpande Vatandars were the most important Vatandars in the Pargana. . . . These Pargana Vatandars had extensive lands and other Haks as remuneration for the services that they rendered to the State. The Deshmukh was responsible to the State for collection of land revenue while the Deshpande was responsible for keeping the accounts of the revenue collections. . . .

The Deshaka Sabha was as a rule convened at the Pargana Town, and the Deshmukh and Deshpande Vatandars, then termed Deshakas, along with others constituted the assembly, and hence it came to be known as the Deshaka Sabha. . . . An examination of the decisions of these bodies during the time of Shivaji discloses the fact that in addition to the persons stated above, two or three learned Brahmins well versed in Mimansa (science of interpretation of the Vedic and Smriti texts) came to be included, called the Mimansakas, as members of the Deshaka Sabha. . . . Whenever any dispute relating to a Pargana Vatandar arose between any Pargana Vatandars, it was primarily the Deshaka Sabha that had jurisdiction to take cognizance of the same. . . .

Having indicated in broad outline, the nature and extent of the jurisdiction of the Deshaka Sabha, I would now proceed to indicate the procedure followed by the Deshaka Sabha in deciding a dispute referred to it for disposal. The Deshaka Sabha used to follow the procedure indicated below:—

- (a) A writing signed by both the parties to the dispute entrusting the matter in dispute to the Deshaka Sabha for decision was taken.
- (b) Bonds were taken from both the parties binding them to abide by the result of the decision of the Sabha.
- (c) After observing these preliminary formalities the Deshaka Sabha took down statements of their respective cases.
- (d) Personal recognizances were also taken from both the parties to the dispute.

The Deshaka Sabha after observing these formalities proceeded to examine the parties and their witnesses. Oaths similar to those mentioned in the last article were administered to the parties and the witnesses. After taking evidence the Deshaka Sabha gave its decision in writing. All those who were the members of the Sabha used to put their signatures or marks below the decision. The decision of the Deshaka Sabha was called Deshaka Mahajar or Deshaka Niwada. The judgment of the Deshaka Sabha stated shortly the facts giving rise to the dispute between the parties, statements of the cases set up by the respective parties, discussion of the evidence adduced before it and its final decision about the points in dispute.

I am giving below a free translation of an old Deshaka Mahajar with a view to give an idea about the constitution of the Deshaka Sabha, the procedure it followed in deciding a case, and their capacity to decide such disputes.]

Mahajar dated 17th Rajab [A. D. 1475]. Highly respected Khan Khoje Tai Saheb and members of the Assembly present.

Suharsan Khamas Sabein Saman Maya.

Names of persons present in the Assembly: [here follow 14 names of higher officers, and 24 names of the headmen of the 24 villages in the district.]

In the presence of the above people, Mahajar [decision] is given to Bhawanji bin Lakhamoji Tapkir, Mokadam Mauja Duraj and Kuroli Pargana Khatav.

Duragadi [famine] having occurred, the whole territory became desolate and depopulated. After many days the country has been again populated and brought under cultivation. In the meanwhile Ramana bin Timana Gawali, cattle-grazer, began to cultivate lands and also to act as Patil [headman]. So when Bhawanji bin Lakhamaji Tapkir returned to the village, he found the Gawali discharging the duties of Patil. Then Bhawanji went to the Thana [head quarter town of the Pargana] and saw the Deshmukh and Desh Kulkarni and enquired about the state of the village. Deshmukh and Desh Kulkarni told Bhawanji, "The Gawali has taken the land for cultivation, you are the old Mokadam [headman] of the village. You should present yourself before the Khan and should make known to him your account". Then Bhawanji bin Lakhamaji Tapkir went to the Audience Hall of the Khan Saheb and lodged the following complaint:

"I am Mokadam from ancient times. I left the country because there was famine. On hearing that the country had settled down, I came to the village, when I found that my lands were given by the Saheb to the Gawali. Saheb is just. I have come to the Saheb. You should therefore decide the dispute and confirm that man in possession who is found to be the ancient Mokadam. If the Saheb does this, he will be doing justice." Upon this the Gawali was arrested and brought before the Saheb and was questioned. "Tapkir being the old Patil, why should you have taken his land on Kaul? You should give your reasons as to why you should have done this". Then the Gawali stated, "I am the old Patil. Saheb should decide the dispute." Thereafter a Sabha [assembly] was called of Deshmukhs, Deshpandes, and the past and present Mokadams to decide the dispute.

The Assembly then questioned both as to whether their dispute should be decided by it. Sureties were taken from both. Their statements were also taken. Then plaintiff Bhawanji bin Lakhamaji Tapkir was asked, "You say that you are the ancient and old Patil. How you will prove this?" Bhawanji bin Lakhamaji Tapkir said, "I shall prove this by the evidence of Deshmukhs, Deshpandes and the Mokadams." Then defendant Ramana bin Timama Gawali was asked, "How will you prove that you are the ancient and old Patil?" Gawali stated: "I shall perform an ordeal and will prove that what I say is true. If I succeed in the ordeal I shall retain the Patilki [office]. If what I say is proved to be false, I shall leave the country". Thereupon the members of the Assembly said, "There is no lamp during day time; that is, no ordeal where there is evidence".

[A most important point worth notice is the one thus raised by the Assembly as to whether the Gawali's offer of performing the ordeal and getting his cause established should be accepted or not. Smriti works have laid down rules regulating ordeals: Yajnyavalkya Smriti, Chapter 2, verse 22, lays down the following rules:—"Written document, lawful possession, and witnesses are described as evidence of a case; in the absence of any of these, a divine test or ordeal is spoken of as evidence." This verse clearly lays down that whenever there is evidence either documentary or oral or of enjoyment to establish a particular fact, resort to an ordeal should not be allowed. In the above case which the Deshaka Sabha had to decide, evidence about the ownership of the Patilki was available and the members of Sabha relied on the corresponding legal maxim in Marathi, meaning "no lamp in day light; hence no ordeal when there is evidence." During day time there is no necessity of a lighted lamp, similarly there is no necessity of an ordeal when there is evidence. This Marathi legal maxim conveys the spirit of verse 22 of the Yajnyavalkya Smriti.]

But Gawali then said, "I am the old and ancient Patil; my ancestors told me so. I have been deprived of the Patilki by force. That is what I state of my own accord. I have offered to perform an ordeal because I am the Patil from ancient times, and therefore the

Assembly should give me the option to perform an ordeal and allow the dispute to be decided in that way".

The Assembly then came to the conclusion that the better course was to get the dispute decided in the way in which the defendant wanted to get it decided. Then Rajinama and the formula to be uttered by the Gawali when performing the ordeal were taken from the Gawali. Then on Friday the nails of the fingers of the Gawali were pared and his hands were made clean. Thereafter they were folded in a pouch and sealed, and he was kept in custody. Then on Sunday a piece of metal was made ready [by placing the metal in a pot of boiling butter]. Butter one seer and a quarter was brought. When everything was ready both were made to stand in front of the deity. The members of the Assembly then said to the Gawali, "If you are the old Patil, take out the piece of metal and place it in the hands of the Tapkir." The Gawali then came near the piece of metal and said, "It is true that I am the old Patil". Saying this, he took up the piece. Immediately on taking the piece the Gawali's hands were scorched and boils appeared. The members of the assembly then said, "Gawali is proved to be false", and came to the Khan at the Thana.

The hands of the Gawali were again folded in pouches and sealed and he was kept in custody. On the third day Khan Saheb called the members of the Assembly and in their presence took off the pouches from the hands of the Gawali, when boils were observed on all the five fingers. The members of the Assembly then asked the Gawali as to whether he was true or false. Gawali confessed that he was found to be false by the ordeal.

Then the Deshmukhs and Deshpandes and Mokadams said that Bhawanji bin Lakhamaji Tapkir was the true Patil, and a Mahajar [decision] should be given to him. This Mahajar is therefore given to him. If any one now raises any dispute or obstructs him, he will be held guilty and regarded as a false man by the Got.

This Mahajar is written according to the decision given. Dated 17th month Rajab Mortab Suda [seal].

55. The Speedy Justice of the Great Mogul, A.D. 1640.<sup>1</sup>*Indian and European Procedure Contrasted.*

[The narrator is a Portuguese friar who spent several years traveling through China, India, Persia, and other regions, A. D. 1637–1643. He is now in India, in 1642, in the reign of the Mogul emperor Shah Jehan, who built the famous mausoleum Taj Mahal.]

Before leaving this mighty and powerful Empire it seems right to make good my promise by giving some account of the despotic government of this monarchy, of which the Emperor is lord paramount over his vassals, or to put it more correctly his slaves, without reference to any laws, all depending upon his personal wishes and judgment.

Yet, notwithstanding this independence, he gives audience publicly once every week, when, seated as supreme judge on a rich, majestic throne, he listens, with infinite patience and keen attention, to all kinds of disputes and causes, civil and criminal, and then and there pronounces a clear, simple, and unequivocal decision, one irrevocable and not appealable. Capital punishment is executed on the condemned with the greatest promptness and cruelty. These judicial powers which the Padchahs or Emperors exercise are also enjoyed by the ministers, acting by delegation in each of the Provinces subject to his rule. I have on various occasions found myself present in the audience both of Nababos, who, as I have stated, correspond to our Viceroys, and of Governors and ministers of inferior position, and recollect that most cases are decided after weighing the pros and cons.

Cases are thus decided without delay and without the necessity for the litigants presenting any written documents or processes [as in Europe], which always protract and extend causes so that in place of justice the greatest injustice supervenes, such as is not

1. From "Travels of Fray Sebastian Manrique", Vol. II, Chap. LXXIV, p. 268; Hakluyt Society Publications, 1927, vol. LXI.

It is known that the particular passage here quoted by Fray Sebastian is a translation, without acknowledgment, of a passage in a Dutch traveler's book, *De Laet*, "De Magni Mogoli, sive India vera Commentarius", etc., chap. IV, p. 127.

met with in this country of infidel Barbarians, or even dreamt of there. But what is far worse, and far sadder and worthy even of being lamented over in tears of blood, is that [in Europe] we encounter and experience this injustice where it should never be seen. If, moreover, we wish to complain of this injustice, unless we have powerful patrons, we meet with such difficulties, and those so insurmountable, that but one remedy remains, and that is to appeal to the divine Judge and at the same time console ourselves by believing that, since He permits this, it must be on account of our many sins.

56. The King's Audience of Justice in Old Burma.<sup>1</sup>*Chastisement for a Groundless Appeal.*

[The Burmese King's justice was not always personal. Since the 1200's—the period of one of the earliest law books—a Supreme Court (for both judicial and executive business) had been developing; it was known as the "Hluttaw Yon". A senior prince presided, when the King did not attend; and it is recorded that though he might capriciously dismiss the judges, he rarely repudiated their decisions. The procedure of this Court in the early 1700's is described by an observant English trading captain, Hamilton, who spent more than thirty years in the East Indies:]

The south gate of the palace is called the Gate of Justice, where all people that bring petitions, accusations, or complaints, enter . . . . . All cities and towns under this king's dominions are like aristocratical commonwealths. The prince or governor seldom sits in council, but appoints his deputy, and twelve counsellors or judges, and they sit once in ten days at least, but oftener when business calls them. They convene in a large hall, mounted about three feet high, and double benches round the floor for people to sit or kneel on, and to hear the free debates of council. The hall being built on pillars of wood, is open on all sides, and

1. From Captain *Alexander Hamilton*, "A New Account of the East Indies", chap. XXXVI (Pinkerton's "Collections of Voyages and Travels", vol. VIII, p. 423, London, 1811).

the judges sit in the middle on mats, and sitting in a ring there is no place of precedence.

There are no advocates to plead at the bar, but every one has the privilege to plead his own cause, or send it in writing to be read publicly, and it is determined judicially within the term of three sittings of council. But if any one questions his own eloquence, or knowledge of the laws of equity, he may empower a friend to plead for him; but there are no fees but what the town contributes for the maintenance of that court, which, in their language, is called the Rounday, and those contributions are very small. There are clerks set at the backs of the judges, ready to write down whatever the complainant and defendant has to say. And the case is determined by the prince and that council, very equitably; for if the least partiality is found awarded to either party, and the King is made acquainted with it by the deputies at court, the whole sentence is revoked, and the whole board are corrected for it, so that very few have occasion to appeal to court, which they may do if they are aggrieved.

And if an appeal is made upon ill grounds, the appellant is chastised, which just rigour hinders many tedious suits that arise where there are no penalties annexed to such faults.

#### 57. A Day in Court in a Modern Mountain Village.<sup>1</sup>

*"Justice! Justice!" is the constant Prayer.*

[The village communities of the various tribes of India, by long tradition, were left largely to their own self-government; they had their own local judges, who interpreted their local customs, and these customs were the only law, in a large part of their daily life. We can re-construct these ancient village courts, in imagination, from the surviving ones in the remote mountain districts, as an observant modern traveler has depicted them:]

Colonel Erskine, the Commissioner for the Kumaon district, invited me to accompany him on his own official tour . . . . .

1. From Lord Frederic Hamilton, "The Days before Yesterday", p. 310, being vol. II of "My Yesterdays" (London, Hodder and Stoughton, 3d ed. 1920), by permission of the publishers.

It was a perfect education traveling with Colonel Erskine, for that shrewd and kindly old Scotsman had spent half his life in India, and knew the Oriental inside out . . . . .

On arriving in a village he would call for a carpet, and a dirty cotton dhuree would be laid on the ground. He would then order a charpoy, or native bed, to be placed on the carpet, and he would seat himself on it, and call out in the vernacular, "Now, my children, what have you to tell me?" All this was strictly in accordance with immemorial Eastern custom. Then the long line of suppliants would approach, each one with a present of an orange, or a bunch of rhododendron flowers in his hand. This, again, from the very beginning of things has been the custom in the East . . . . . Colonel Erskine was a great stickler for these presents; and as they could be picked off the nearest rhododendron bush, they cost the donor nothing.

The outpouring of grievance and complaints then began, each applicant always ending with the two-thousand-year-old cry of India, "Dohai, Huzoor!" ("Justice, my lord!"). The old Commissioner meanwhile listened intently, dictating copious notes to his Brahmin clerk, and at the conclusion of the audience he would cry, "Go, my children, Justice shall be done to all of you," and we moved on to another village. It was very pleasant seeing the patriarchal relations between the Commissioner and the villagers. He understood them and their customs thoroughly; they trusted him and loved him as their official father, . . . . . (The Brahmin clerk was a very intelligent man, and spoke English admirably; but I took a great dislike to him, noting the abject way in which the natives fawned on him. Colonel Erskine had to discharge him soon afterwards, as he found that he had been exploiting the villagers mercilessly for years, taking bribes right and left.)

#### 58. "Sitting Dharna."

*Self-Sacrifice to Compel a Wrongdoer to Make Redress.*

["Sitting dharna"—the procedure by which a person conceiving himself injured seeks redress by a sacrificial act which calls public attention and obliges the wrongdoer to give redress—is found as a

recognized part of procedure in both the early Celtic and the early Hindu law texts. But it has close analogies in other people's practices—including the Polynesian taboo and the ancient Japanese hara-kiri. All alike seem to have as the original foundation a belief that the Deity will intervene to punish the wrongdoer, if the complainant will by some self-sacrifice demonstrate his sincerity and rightness. Some of the extremest forms of it are found in certain parts of China. Sir Edmund Hornby relates ("Autobiography," 1929, p. 283), "A man who has been seriously injured in mind, body, or pocket, and has not been able to obtain redress, will often go and hang himself at the door of the wrongdoer, so that his spirit may avenge the wrong which he in life had not been able himself to avenge." Mr. Skrine ("Chinese Central Asia", 1920, p. 124), writing of the Dulain tribe, tells that "it is a regular thing for one who has a quarrel with another to threaten to kill his [own] child or himself 'at' his enemy, i.e., in order to bring bad luck on him, and sometimes he does it, too. . . . In a case I heard, as judge, with the [Chinese governor] Amban of Maralbashi, one of the main issues, argued at great length, was whether the plaintiff, who had attempted to kill himself by swallowing an overdose of opium, had done so 'at' the defendant, or, as the latter maintained 'at' a third party."

Here are given: (1) The original passage from Sir Henry Maine which called the attention of the learned world to this peculiar procedure<sup>1</sup>; (2) next, a tragic example in India of the sincerity of the threat, in the late 1700s; and (3) finally, another variety of the same idea, in the 1500s. It may be added that Sir Cecil Walsh, a magistrate in modern India has recorded ("Crime in India", 1930, p. 49) that even nowadays "a Hindu will sometimes try to overpower a neighbor with whom he has a dispute and make him give in . . . by sitting down outside his door and slowly starving himself."]

(1) The Irish rules of distraint very strongly resemble the English rules, less strongly resemble the Continental Teutonic rules,

1. From Sir Henry Sumner Maine, "Lectures on the Early History of Institutions," London, John Murray, 1889, 5th ed., Chap. X, "Primitive Forms of Legal Procedure," p. 296.

but they include one rule not found in any Teutonic Code, almost unintelligible in the Irish system, but known to govern conduct even at this hour all over the East, where its meaning is perfectly clear. This is the rule that a creditor who requires payment from a debtor of higher rank than himself shall "fast upon him."

The corresponding Indian practice is known, I before stated, as "sitting dharna"—*dharna*, according to the better opinion, being exactly equivalent to the Roman "*capio*," and meaning "detention" or "arrest." In the Vyavahara Mayukha, a Brahminical law-book of much authority, Brihaspati, a juridical writer sometimes classed with Manu, is cited as enumerating, among the lawful modes of compulsion by which the debtor can be made to pay, "confining his wife, his son, or his cattle, or *watching constantly at his door*."

Lord Teignmouth has left us a description (in Forbes' "Oriental Memoirs," ii. 25) of the form which the "watching constantly at the door" of Brihaspati had assumed in British India before the end of the last century: "The inviolability of the Brahmin is a fixed principle with the Hindoos, and to deprive him of life, either by direct violence or by causing his death in any mode, is a crime which admits of no expiation. To this principle may be traced the practice called 'dharna,' which may be translated 'caption' or arrest. It is used by the Brahmins to gain a point which cannot be accomplished by any other means, and the process is as follows: The Brahmin who adopts this expedient for the purpose mentioned proceeds to the door or house of the person against whom it is directed, or wherever he may most conveniently arrest him; he then sits down in 'dharna' with poison or a poignard or some other instrument of suicide in his hand, and threatening to use it if his adversary should attempt to molest or pass him, he thus completely arrests him. In this situation the Brahmin fasts, and by the rigour of the etiquette the unfortunate object of his arrest ought to fast also, and thus they both remain till the institutor of the 'dharna' obtains satisfaction. In this, as he seldom makes the attempt without the resolution to persevere, he rarely fails; for if the party thus arrested were to suffer the Brahmin sitting in dharna to perish by hunger, the sin would for ever lie upon his head. This practice has

been less frequent of late years, since the institution of the Court of Justice at Benares in 1793; but the interference of the Court and even of the Resident has occasionally proved insufficient to check it."

The indefinite supernatural penalty has become the definite supernatural penalty incurred by destroying life, and particularly human life. The creditor not only "watches at the door," but kills himself by poison or dagger if the arrest is broken, or by starvation if payment is too long delayed. Finally, we have the practice described by Lord Teignmouth as one peculiarly or exclusively resorted to by Brahmins. The sanctity of Brahminical life has now in fact pretty much taken, in Hindoo idea, the place once occupied by the sanctity of human life, and "sitting dharna," when the English law first endeavoured to suppress it, was understood to be a special mode of oppression practised by Brahmins for a consideration in money. This is the view taken of it by the Indian Penal Code, which condemns it in the following terms (s. 508):—

"Whoever voluntarily causes . . . any person to do anything which that person is not legally bound to do . . . by inducing . . . that person to believe that he . . . will become by some act of the offender an object of Divine displeasure, if he does not do the thing which it is the object of the offender to cause him to do . . . shall be punished with imprisonment, &c."

"Sitting dharna," placed under the ban of British law, chiefly survives in British India in an exaggerated air of suffering worn by the creditor who comes to ask a debtor of higher rank for payment, and who is told to wait. But it is still common in the Native Indian States, and there it is pre-eminently an expedient resorted to by soldiers to obtain arrears of pay.

(2) *A Tragic Ending to a Sitting Dharna, A.D. 1781.*<sup>2</sup> Notwithstanding their apparent gentleness and timidity, the Hindoos

2. From Mrs. *Eliza Fay*, "Original Letters from India, 1779-1815", New York, Harcourt, Brace & Co., 1925, p. 217, by permission of the publishers.

Mrs. Fay was the wife of a British advocate at the Supreme Court of Calcutta. Her letters, first published in 1817, were a treasure of authentic observation in vivid narrative, and were re-edited in 1925 by E. M. Forster, the well-known authority on India.

will meet death with intrepid firmness—they are also invincibly obstinate, and will *die* rather than concede a point. Of this a very painful instance has lately occurred. A Hindoo beggar of the Brahmin caste went to the house of a very rich man, but of an inferior tribe, requesting alms; he was either rejected, or considered himself inadequately relieved, and refused to quit the place. As his lying before the door and thus obstructing the passage was unpleasant, one of the servants first intreated, then insisted on his retiring, and in speaking pushed him gently away; he chose to call this push a blow, and cried aloud for redress, declaring that he would never stir from the spot "till he had obtained justice against the man"; who now endeavoured to sooth him but in vain. Like a true Hindoo he sat down, and never moved again, but thirty-eight hours afterwards expired, demanding justice with his latest breath; being well aware that in the event of this, the master would have an enormous fine to pay; which accordingly happened.

(3) *Another Variety of the Same Procedure.*<sup>3</sup> When any one ought to receive money from another merchant, there appearing any writing of the scribes of the King (who has at least a hundred of them), they observe this practice:—Let us suppose the case that some one has to pay me twenty-five ducats, and the debtor promises me to pay them many times, and does not pay them; I, not being willing to wait any longer, nor to give him any indulgence, shall take a green branch in my hand, shall go softly behind the debtor, and with the said branch shall draw a circle on the ground surrounding him, and if I can enclose him in the circle, I shall say to him these words three times: "Bramini raza pertha polle"; that is, "I command you by the head of the Brahmins and of the King, that you do not depart hence until you have paid me and satisfied

3. From *Ludovico di Varthema*, "Travels", ed. *Badger* (Hakluyt Society Publications, 1873, 1st Series, Vol. XXXII), p. 147; a famous Italian traveler of A. D. 1500.

An almost identical account of the same procedure is given in *Martin Fernandez de Enciso*, an early Spanish explorer, in his "Suma de Geographia", 1519, as translated in 1540 by an eminent English merchant-traveler, *Roger Barlow*, in his "Brief Summe of Geographie", ed. *E. G. R. Taylor* (Hakluyt Society Publications, 1931, Vol. LXIX, p. 146).



me as much as I ought to have from thee." And he will satisfy me, or truly he will die there without any other guard. And should he quit the said circle and not pay me, the King would put him to death.

### 59. Trial Procedure among the Khasi Tribe of Assam.<sup>1</sup>

#### *Judge and Jury eat the Fine, i. e. a Pig.*

[At the northeast corner of India, in the province of Assam, bordering on Burma, is an ancient people, of some 160,000 population, the Khasis. They form a race-pocket of Indo-Chinese kinship amidst surrounding tribes of Tibeto-Burman stock. Their home is a region of beautiful hills; one of their towns is celebrated as the place which has the greatest recorded rainfall on the globe. They are a sturdy people, once known as great raiders on their neighbors, but now peaceable and well esteemed by the British officials who have had to do with them, enjoying almost complete autonomy in their local affairs, under treaty with the Government of India.

The narrator, superintendent of ethnography in Assam, was for some years Deputy-Commissioner of the district, and his monograph covers their entire mode of life.]

*Decision of Disputes. Khasi Courts of Judicature.* In the first place a complaint is made before the Siem, or chief, against a certain party or parties. The facts and circumstances of the case are then detailed before the chief and his headmen, the ostensible object being to attempt to bring about a compromise between the parties. If no reconciliation can be effected, a crier (*u nong pyria shmong*, or in the Jaintia Hills a *sangot*) is sent out to proclaim at the top of his voice the durbar which is to assemble the following evening. He proceeds to cry the durbar [assembly] in the evening when all the inhabitants have returned to the village from their usual daily pursuits. With a loud premonitory yell the crier makes use of the following formula:—

1. From Lieut.-Colonel P. R. T. Gurdon, "The Khasis," London, Macmillan & Co., 1914, 2d ed. p. 91, by permission of the publishers.

"*Kaw!* thou, a fellow-villager; thou, a fellow-creature; thou, an old man; thou, who art grown up; thou, who art young; thou, a boy; thou, a child; thou, an infant; thou, who art little; thou, who art great. *Hei!* because there is a contest. *Hei!* for to cause to sit together. *Hei!* for to cause to deliberate. *Hei!* for to give intelligence together. *Hei!* about to assemble in durbar. *Hui!* for to listen attentively. *Hei!* ye are forbidden, *Hei!* ye are stopped, to draw water then, to cut firewood then; *Hei!* to go as coolies then; *Hei!* to go to work then; *Hei!* to go a journey then; *Hei!* to descend to the valley then; *Hei!* he who has a pouch. *Hei!* he who has a bag. *Hei!* now come forth. *Hei!* now appear. *Hei!* the hearing then is to be all in company. *Hei!* the listening attentively then is to be all together. *Hei!* for his own king. *Hui!* for his own lord, lest destruction has come; lest wearing away has overtaken us. *Kaw!* come forth now, fellow mates."

This proclamation is called *khang shmong*, and by it all are stopped from going anywhere from the village the following day. Anybody who disregards the prohibition is liable to a fine.

The following day, towards evening, all the grown-up males of the village assemble at the durbar ground, the site of which is marked in some villages by rows of flat stones, arranged in an irregular circle, upon which the durbaris [members] sit. The proceedings are opened by one of the headmen, who makes a long speech; then others follow, touching upon all sorts of irrelevant matters, but throwing out hints, now and then, bearing on the subject of accusation. By degrees the debate waxes warmer, and the parties get nearer the point.

Then the complainant and the defendant each of them throw down on the ground a turban, or a bag, containing betel and *pan*, lime, &c., in front of the durbar. These are regarded as the pledges of the respective parties and their representatives in the suit; they receive the name of *mamla* (hence the Khasi term *ar liang mamla* for the two contending parties in the suit).

There are pleaders on both sides called '*riw said*', who address the durbar in lengthy speeches, the Siem being the judge and the whole

body of the durbar the jury. Witnesses are examined by the parties; in former times they were sworn on a pinch of salt placed on a sword. The most sacred and most binding form of oath, however, is sworn on *u klong* (a hollow gourd containing liquor).  
\* \* \*

The durbar sometimes goes on for several days. At length the finding of the durbar is taken, after the Siem has summed up, and sentence is pronounced, which generally consists of a fine in money, almost always accompanied by an order to the losing party to present a pig. The pig is supposed to be sacrificed to a goddess, *Ka 'lei synshar*, i.e. the goddess of the State, but it is invariably eaten by the Siem and the members of the durbar. The Siem then calls out "*kumta mo khynraw*" (is it not so, young people?) The members of the durbar then reply, "*haoid kumta khein khynraw*" (yea, it is so, young ones).

#### 60. The Ordeal of the Sacred Tree.<sup>1</sup>

##### *The Tree's Embrace Frees or Condemns.*

An English tourist describes entertainingly how while traveling in that country in 1881, he witnessed a remarkable case of trial, or rather purgation, by ordeal, and at a place not more than a dozen miles from a city where at the same hour English lawyers were pleading before English judges. It was the ordeal of the Tree of Justice.

It appears that one fine day the tourist, observing in the distance a peculiar shaped hill, bare and bald on its crown, set off to mount it. Reaching the top, he came to an inclosure built of sunburnt brick, over which projected the boughs of a large tamarind tree. Entering by the gate, which stood ajar, he found inside an old man seated beside a tomb.

"What place is this?" inquired the tourist.

"This is the hill of Saith Pir Khan, sahib. Here is his tomb and also his tree."

1. From *George H. Westley*, "Modern Survivals of the Ordeal", *The Green Bag*, 1900, vol. XII, p. 625.

"The tree is sacred to him, then?"

"When the Pir Sahib had finished his battle with the goddess who at that time occupied the place, he sat down and picked his teeth with a twig of tamarind. It grew and became a tree."

Looking at the tree, the Englishman noticed a certain peculiarity about it. The trunk had divided at about three feet from the ground, and the two limbs had grown together again about four feet higher up, thus leaving an irregularly shaped opening.

"The Pir Sahib planted it there in order that justice might not fail to remain near his tomb," said the old priest.

"Justice," said the visitor, "how do you mean?"

"The sahib must know that the Pir's spirit is in the tree. Any-one who is falsely accused may come here and pass through the opening, and by so doing his innocence is proved; but the Pir seizes the guilty by the loins and holds them there." A curious tradition, thought the Englishman, as he walked closer to the tree to examine it.

"Possibly in the old days such a thing may have happened," he said to the priest, "but the tree has contracted considerably since then. No one could get through it now."

"Pardon, sahib, one went through only three days ago."

"What! Do people pass through that aperture now?"

"When the Pir permits them, sahib."

"You have seen them pass yourself? Children of course?"

"A full grown woman has passed, sahib. And men have stayed in the tree for three days."

"And how did they manage to eat and drink?"

"How should they eat and drink while the Pir held them by the loins?"

"And how did they get through at last?"

"They confessed, and the Pir Sahib pitied them. One, a fat trader, was obstinate. I gave him all assistance, but he stayed."

"How did you assist him, moolajee?"

"I beat him often and hard, sahib, but it was the third day before he confessed. Then the Pir opened his hand and he went."

The tourist examined the hole more closely. It was a long opening, narrower at the middle than above or below. The upper part was the widest. He put in his head till brought up by his shoulders. He felt sure that it was impossible for a grown man to get his chest through such a narrow slit. "It is not to be done, *moolajee!*" he said.

The old man smiled. "If the sahib will wait an hour, he will see with his own eyes."

There was no saying fairer than that, and so the tourist waited, determined to see the thing through. In a little while a number of persons were observed coming up the hill, and presently they arrived, three women and three men. While five of the party entered into conversation with the priest, the sixth stood aside, a fine young fellow of about twenty-five, with a remarkably good pectoral development, a smooth face, and curly hair. Evidently he was the principal actor in this affair.

There was very little delay. In a minute or two the women seated themselves beside the tomb, while the man on trial stripped to his waist cloth. His male friends brought water and threw it over his head and shoulders. He was then led up before the priest, who was standing beside the tomb with a lighted lamp. Handing this lamp to the young man, the priest made him repeat word by word a form of denial of the offence with which he was charged. It seemed that a lady's character was at stake, and consequently a gentleman's. But singularly enough it was not this young man's own moral conduct that was impugned, but his brother's. It was a case of purgation by proxy. The concluding words of the oath were: "If this be not so, then may the saint seize me by the loins!"

It should be explained that the tree stood some three feet from the wall, from which a brick projected to supply a rest for one foot. The young man now placed his right foot against this, and thrust

his head and shoulders into the opening about as far as the visitor had done. How he was to get farther, the latter could not see for the life of him. The next moment, however, the young man gave a quick strong push with his bent leg from the wall, and as he did so a groan was forced from his chest, and his face which came half out grew purple and distorted like that of a man in the clutch of apoplexy. His foot and leg seemed to go on thrusting his body forward independently of his will, and as recklessly as if it were dead matter. The sound of the scrunching of the cartilage of the lungs, as they were jammed and driven by main force into the tree, made the Englishman feel actually sick. The struggle lasted about five minutes. After the first groan, which was produced no doubt by the mechanical expulsion of the air from the lungs, the man never uttered a sound. The priest stood by, silent and grave. The poor soul went through his bitter ordeal alone.

Presently it was clear that the worst was over. As soon as the young man's chest and arms were free, the priest showed him how to support one hand on a little knotty excrescence of the trunk below him, while the other grasped a small branch that grew out above. So directed, he had no very great difficulty in getting the rest of his body through, and there he stood apparently very little the worse for his painful experience.

A thing which struck the Englishman as peculiar was the calm indifference of the spectators. They had looked on with no more excitement perceptible in their manner than if they had been watching a sheep trying to get through a thorn fence. There were no congratulations and no expressions of sympathy with the awful sufferings that this incomparable brother must have undergone. The little party gathered up its belongings and went away as composedly as if they were just returning from an afternoon call.

When left alone with the priest, the tourist made his acknowledgments, whereupon the old gentleman smiled in a superior manner. "The Pir Sahib is a doer of justice," he said simply, pocketing his fee of one rupee.

Does the reader desire any further explanation of this remarkable scene? I give the conclusion in the tourist's own words. "In

thinking the matter over I came to believe that there was a certain amount of power in the hands of the priest. You see, it was the upper part of the opening that was passed. There was no jugglery in that; nothing but the most determined resolution, kept up by the most utter faith, could drive a man through those torturing Symplegades. But when the chest was clear and the narrower waist came above the narrower part of the upper and under apertures, I can fancy that the body, if unsupported, would naturally sink and the waist be received in the lower one. Once there, no amount of struggling would clear the shoulders or the hips, and the victim would remain literally 'caught by the loins'—the very penalty he had invoked upon himself. According to this theory, the critical moment was that at which the priest indicated to the man, already practically free, where to place his hands, ostensibly merely so as to spare him the awkwardness of rolling out head first, unsupported, upon the ground below. Had his hands not been so placed, the indispensable support would have been wanting and the saint would have seized the convicted offender exactly at the moment when he fancied himself 'out of the wood.'"

"That afternoon," concluded the Englishman, "I was nearer in spirit to the Middle Ages than I ever shall be again."

#### 61. Civil Justice in the Modern Kingdom of Nepal.<sup>1</sup>

##### *A Water-Ordeal well Fortified against Fraud.*

[In the northwest corner of India lies Nepal,—a long oval scenic valley-bowl, bounded by Himalaya ridges and peaks 25000 feet high; one of the only two remaining countries of the world which have been able to retain a sturdy political independence and to prohibit effectively the entrance of any uninvited foreigners. The dominant race is the warlike Gurkas; the dominant religion is

1. From *Brian Houghton Hodgson*, "Miscellaneous Essays relating to Indian Subjects", London, Trübner & Co., 1880; vol. II, Section XII, "Some Accounts of Law and Police as recognized in the State of Nepal", pp. 211, 220. The author was formerly British Minister at the Court of Nepal, and became the best informed authority on the language and the customs of its people.

Brahmanism. Its temples and public buildings exhibit superb examples of advanced architecture, worthy to be named among the world's wonders, though few outsiders have been permitted to view them. The government is highly organized; its system of justice consists of professional judges, with an elaborate arrangement of jurisdictions and appeals.

Its procedure in criminal cases leaves little to be desired, in comparison with the Occident. But for civil cases, singularly enough, it has retained the ordeal into very modern times.

Reserved for cases where the creditor has no plain proof, but popular and frequent nevertheless, the ordeal is surrounded by precautions which are calculated to defeat fraud. Nominally an appeal to the Deities, it is practically a resort to chance. It was described, two generations ago, by an impartial observer whose scientific acquaintance with the Nepalese manners and customs has been unexcelled:]

If a person comes into court and states that another person owes him a certain sum of money, which he refuses to pay . . . and the defendant, when produced in court, denies, instead of confessing, the debt, then the plaintiff's proofs are called for; and if he has only a simple note of hand unattested, or an attested acknowledgment, the witnesses to which are dead, then the Chief Justice and deputy Judges interrogate the plaintiff thus, "This paper is of no use as evidence; how do you propose to establish your claim?" The plaintiff may answer, "I lent the money to the father of the defendant; the note produced is in his hand-writing, and my claim is a just claim." Hereupon the plaintiff is required to pledge himself formally to prosecute his claim in the court in which he is, and in no other. . . .

The next step is for the Court to take the fee called *karpan*, or five rupees, from each party. . . . The giving of *karpan* by the parties implies their desire to defer the dispute to the decision of the ordeal; and accordingly, as soon as the *karpan* is paid down, the Chief Justice acquaints the Government that the parties in a certain cause wish to undergo the ordeal. The necessary order

is thereupon issued from the Government; but when it has reached the court, the Chief Justice and deputy Judge first of all exhort the parties to come to an understanding and effect a settlement of their dispute by some other means; if, however, they will not consent, the trial is directed to proceed.

The ordeal is called *nyaya*, and the form of it is as follows:—The names of the respective parties are inscribed on two pieces of paper, which are rolled up into balls, and then have prayer offered to them. From each party a fine or fee of one rupee is taken; the balls are then affixed to staffs of reed, and two *annas* more are taken from each party. The reeds are then entrusted to two of the bailiffs of the court to take to the Queen's Tank or pool; and with the bailiff, a deputy judge of the court, a Brahman, and the parties proceed thither, as also two men of a very low caste. On arriving at the tank, the deputy judge again exhorts the parties to avoid the ordeal by adopting some other mode of settling the business, the merits of which are only known to themselves.

If they continue to insist on the ordeal, the two bailiffs, each holding one of the reeds, go, one to the east and the other to the west side of the tank, entering the water about knee deep. The Brahman, the parties, and the low caste men all at this moment enter the water a little way; and the Brahman performs prayer to Varuna in the name of the parties, and repeats a sacred text, the meaning of which is, that mankind know not what passes in the minds of each other, but that all inward thoughts and past acts are known to the gods Su'rya, Chandra, Varuna, and Yama; and that they will do justice between the parties in this case. When the prayer is over, the Brahman gives the balls of scroll to the two low caste men, and says to them, "Let the champion of truth win, and let the false one's champion lose!"

This being said, the Brahman and the parties come out of the water, and the low caste men separate, one going to each place where one of the reeds is erected. They then enter the deep water, and at a signal given, both immerse themselves in the water at the same instant. Which ever of them *first* rises from the water, the

reed nearest to him is instantly destroyed, together with the scroll attached to it. The other reed is carried back to the court, where the ball of paper is opened, and the name read. If the scroll bear the plaintiff's name he wins the cause; if it be that of the defendant, the latter is victorious. The fine called *jit'hour*i is then paid by the winner, and that called *harouri* by the loser. . . .

In this manner multitudes of causes are decided by *nyáya* (ordeal), when the parties cannot be brought to agree upon the subject matter of dispute, and have neither documentary nor verbal evidence to adduce.

*Chapter 12*  
*INDO-CHINA*

## INDO-CHINA

62. Trial Scenes in the Highlands of Annam.<sup>1</sup>*A Seer Pronounces the Ancestral Law; and a Sorcerer Conducts an Ordeal.*

The Mois have never had any contact with civilized people, yellow or white. Having taken refuge in the forests of the high plateaus, they have lived there for centuries, exactly as their ancestors must have lived who came from Malaysia in unknown times. They hunt, breed buffaloes, transplant mountain-rice in little clearings. They have no writing and hence no history; no religion but fear; not a glimmer of knowledge. They know absolutely nothing. On the maps of Indo-China, as recently as twenty-five years ago, the Moi territory was left blank. One read simply: "Waste land—Savages." The Annamites even held that they were cannibals.

Such are the primitive folk suddenly assaulted by the twentieth century; in one breath presented with electricity, the telegraph, motorcars, airplanes, motion-pictures. \* \* \* There are still thousands of them who have never set eyes on a white man and who never even heard of France. They do not know their age; they cannot reckon the time; they think the earth is circular and flat like a pancake; they can count only with the aid of their ten fingers or knots in a string; they shout and beat their gongs on a night of eclipse, so that the sun may refrain from doing violence to the moon.

And it is among these utterly untutored beings that civilization is now on the point of hurling itself, attracted by the riches of their land. \* \* \*

1. The first episode is from *Roland Dorgelès*, "On the Mandarin Road," translated by Gertrude Emerson; Century Co., New York, 1926, pp. 270-303.

The second episode is from Captain *Henry Baudesson*, "Indo-China and its Primitive People," translated by E. Appleby Holt; New York, E. P. Dutton & Co. 19—, p. 92.

## Chapter 12

## 62. Trial Scenes in the Highlands of Annam.

*A Seer Pronounces the Ancestral Law; and a Sorcerer Conducts an Ordeal.*

Two or three times during the week, we administer justice. (How queer these words will sound when, later on, I relate my memories to my grandchildren!) To be sure, I do not render decisions, but on the days when hearings are held, seated at my customary place before a rustic table, I have the air of playing clerk of the court, and the squatting Mois watch me with fear.

The veranda of the residency is the court-house. The judges are three Radé chiefs, and the crowd of the accused and the complainants overflow the stairs with a motley confusion of striped cloths, naked thighs, bracelets, turbans, lances, and glistening eyes, while on the sun-beaten square, elephants and prisoners with their necks in stocks pass by.

The law of the Radé is not incorporated in a code; it is disseminated in innumerable sayings that have been handed down for ages, and the ancients recite these in guttural tones, while they seem to beat out the measure with lifted hand. Elsewhere I have known law; here I had a glimpse of equity. And if I am able now to imagine Solomon on his throne or St. Louis under his oak, it is neither to the Bible nor to Joinville that I am indebted: it is to those three savages with copper bracelets and tin necklaces.

Of the three, I liked best the oldest, Ma-ngay, who presided. Crippled by rheumatism, he used to arrive on a horse so small that his feet dragged in the dust. When he walked, he had to lean on a cane, one hand resting on his lame thigh; but though he was so bent with his ailment, he still made a fine figure. He used to seat himself in a funny manner in his wicker arm-chair, with one foot tucked under him in such a way that he could rest his chin on his knee, and it was in this position that he followed the cases, his face set, his wrinkled cheek always distended with a quid of betel.

Y-thuop, the youngest, was also the most modern. He arrived on a bicycle, wearing a bath-towel knotted round his waist in lieu of a sash. Since he was a personage, however, he never showed himself without his little red-braided jacket with its copper buttons, which he wore wide open on his athletic chest.

Ma-bli, the third judge, did not look severe, though he had a wily eye. He was always draped in a blanket, as if cold, and he smiled incessantly, even when insisting that the culprit be hanged.

It was Y-thuop who led the debates. He assumed important airs, yawned, stretched himself, reknotted his towel, interrupted the witnesses. Less experienced than Ma-ngay, no doubt, less spiteful than Ma-bli, but with more intelligence in his look and more authority in his voice, qualities needed to bring light into these law cases!

At times all the inhabitants of a village came to testify, half on one side, half on the other, and hardly had the plaintiff uttered two words before the row would begin. The old women stopped hunting lice, the men shoved back their betel-quid, the plump babies were thrown down among their wrappings and had to stop nursing, and all of them bellowed, threatened, and insulted one another, so that in the frightful din it was quite impossible to make out what the trouble was about. But Y-thuop was equal to the occasion. Ten times he began the examination anew, summoned one, sent back another, laughed boisterously at the howling; and then suddenly the months of prison and the fines fell, also sacrifices, consisting of a pig or a buffalo to be slaughtered. As soon as sentence was pronounced, bracelets were exchanged and the pacified villagers returned home in Indian file, their baskets on their backs.

Now and then it was a deceived wife or husband who came to demand that punishment be meted out to the guilty. Yes, even here! Adultery, like food and drink, is to be found in every country. Ma-bli, inert until now, suddenly came to life under his blanket. For once interrupting Y-thuop, who was on the point of asking the Moi woman whether or not she confessed to the fault, Ma-bli slyly questioned: "How many times did you betray your husband?"

The woman fell into the snare. Instead of denying, she answered, thinking she would be pardoned, "Once."

"You shall be punished!" Ma-bli exclaimed triumphantly. And Y-thuop, falling back in his chair, laughed heartily.



Decisions were cast primarily in relation to tangled questions of property division, sales and inheritance, and in these disputes about money, the Mois displayed the same animosity that our French peasants show. How was it possible ever to know who was right? No papers, no contracts, no receipts exist, because these people cannot write. Nothing but a bracelet, and unreliable witnesses who give one another the lie, are forthcoming by way of proof. How have they been able even so much as to record the things they are disputing about? By making notches in a bamboo or tying knots in a string. "He lies!" screamed a simple-minded Moi from whom an Annamite was claiming fifty piasters. "I have only twenty-seven knots in my string." And he waived it, sure of his claims, like a provincial litigant with his stamped documents.

These discussions sometimes turned into quarrels, and Y-thuop, in spite of his threats and his scowls, could not settle matters. Who was to be the heir? There is no civil code. Would the elephants and the jars go to this family or to that one? The cohorts shouted on behalf of their clans. Old harpies added their screeching to the tumult. Men surreptitiously dealt blows to one another, and the militiaman on duty kept dropping the butt of his gun on the bare feet of the worst offenders.

It was then that old Ma-ngay would emerge from his silence. All at once he would stretch out his arm, fingers spread wide, and with an altered voice and measured words he would begin to recite. All grew quiet. They understood. It was the Bidoué, the ancestral law:

Copper bowl in hawk's nest, copper bowl in knee's nest.  
Baskets, wallets, small objects—you should keep them, you, eldest sister.

Calabashes, ash-baskets, sharpening-stones, wood for utensils, dyeing brushes, brushes of wild boars' bristles—you, eldest sister, should keep them.

Precious pots hidden in the swamps, gongs, jars, pretty articles, valuable articles—to you, eldest sister.

Riding-horses, elephants, slaves, buffaloes, pigs, chickens—to you alone, eldest sister.

Servants and slaves, the young girls and the young men, shall labor with you in the field, eldest sister.

The bananas, the yams, the rice you shall divide with your sisters, eldest sister. The entrails of the buffalo and the flesh of pigs you shall divide into equal parts, eldest sister. Small pots, small calabashes, objects worth one dah, divide among your sisters, you, eldest sister.

Without dispute, with no outcry. Do not leave one another. Do not separate. Live together. Otherwise, small or great, weak or strong, will be lost. Give aid to one another. . . .

He declaimed this in a strange broken voice, which made the ringing words still harsher, and his two judges, nodding their heads, murmured with him, scarcely moving their lips, like worshipers following the mass. The others listened in silence, recognizing the familiar phrases. It seemed to them that their ancestors were judging them.

"Listen to me; I am the past!" old Ma-ngay occasionally exclaimed above the clamoring voices, extending his arm weighted with bracelets. And he possesses such barbaric nobility that all present were silenced, overawed.

For every case, every delinquency, the old hunter brought up from the depths of his memory a fragment of Bidoué, and his hand with the crippled fingers mysteriously beat out its rhythm. It was no longer the subtle Y-thuop who led the controversy; it was Ma-ngay, haughty, austere. "I speak straight, and thou wilt not listen! I utter the truth, and thou hearest me not!" Unconsciously he used the same figurative language as that of the ancestral law. "Thou didst take the gongs and beat them until they cracked. Thou didst swing the firebrand like a crazy man, without fearing to set fire to thy village."

He alone, this survivor of old Da-rlac, can speak in the name of the past. He sees that everything is disintegrating. Customs are forgotten. The children dispute feverishly for the inheritances established by centuries of matriarchy. The jars are scattered, the elephants sold; the daughters and the sons take themselves off, each one for himself. \* \* \*

He had finished. Y-thuop proposed a penalty. Ma-bli smilingly asked for a severer one. But Ma-ngay, chewing his betel, had

nothing more to say and impassively contemplated the prisoner, upon whose neck the stocks were clapped by a militiaman. He was able to judge everything without opening any code-book, without citing any rules. . . .

[A Trial by Ordeal] No luxurious court-house, no gilt and trappings here! The headman, following the example of St. Louis, administers justice beneath a sacred fig-tree—the most majestic object conceivable—beneath whose all-embracing branches a concourse, vaster than any that throngs our courts at a sensational trial, could find shelter. The chiefs surround their President and form a truly imposing tribunal. The Sorcerer, too, is there, and he will play the chief part to-day.

Some cattle have been stolen a week or so ago and every man suspects his neighbor of the crime. The real malefactor, however, is known only to the Spirits, and they alone can expose him. As their cares and interests are too multifarious to permit them to appear in person on the earth, our Sorcerer declares that they have assigned to him their powers and functions for the occasion. To-day he will be their mouthpiece. He takes an egg lightly between his thumb and first finger, pressing the ends with two other fingers. At his request a young assistant proclaims in a wailing voice the names of all the neighbouring lands. He cannot believe, he tells us, that a fellow countryman should be guilty of so dastardly an outrage. But the recital is over and the egg has not trembled. There is nothing left but to call out the name of his own village. Alas! No sooner are the words uttered than an ominous crack is heard and a sticky yellow fluid issues from the shell, now broken in two. Recourse must now be had to the evidence. The circle of inquiry is narrowed, and it only remains to discover the guilty individual.

The first experiment has proved far too successful to be discarded in favour of any innovation. An egg, balanced in the same way as before, will be the sole cost of the continued investigation. The same unsophisticated youth now proceeds to recite the names of all the inhabitants of the village. In most cases he designates them by their nicknames. The "Squirrel," the "Pagoda Cock", and

the "Marabout" are at present white as snow. They all appear to heave an immense sigh of relief as their names are called out without any sign of expostulation from the egg. It is plain that their belief in the justice of the Spirits is far from profound. They lose no time in vanishing from the scene.

Suddenly, just as the youthful voice proclaims "The Scorpion," the egg unmistakably collapses. The malefactor thus indicated is a broken-down old man, an object more of sympathy than of suspicion. His rickety frame is supported with considerable difficulty by his legs, which are swollen to an unnatural degree by gout. But the eye of the Spirits is piercing, their justice unfailing. No escape for the guilty is possible. However, as the accused protests his innocence with all the emphasis at his command, the Pholy condescends to allow him to prove it by submitting to the ordeal prescribed by the Gods. Two alternatives are offered to him, the ordeal by water and that by boiling resin, in which an innocent man may plunge his hand and withdraw it unharmed.

"The Scorpion" is not slow to choose the former. The divine instrument of trial is near at hand in the shape of a river which flows within a short distance of the sacred judgment tree. While the preparations for the ordeal are going forward, the accused asks for permission to make a preliminary statement. If he can associate an accomplice with him in the crime, it will doubtless mitigate his punishment. Accordingly he formally names another villager as his partner in transgression. The alleged partner's vigorous denials are followed by immediate arrest.

The question now is as to the respective degrees of guilt, a point which the river will ultimately settle. Two stakes are driven into the middle of the stream at a point where the depth is about ten feet. The unfortunate victims are conveyed by canoe to the spot and left clinging desperately to the stakes while trying to keep their heads under water as long as possible. The test is quite simple. The one who loses his breath and comes up to the surface first stands convicted of being the principal in the theft, while his larger-lunged rival is cleared of everything save the charge of complicity.

In a few seconds the performance is over, for the unhappy "Scorpion," already paralysed by fear of the immersion, cannot hold his breath at all, and bobs up to the surface immediately, half asphyxiated. The Sorcerer, delighted at the result of his experiment, expresses his appreciation in a series of approving gestures.

The principle of the ordeal rests on the belief, prevalent among the great majority of half-civilized races, that the tutelary deity of any individual withdraws his protection and assistance if his "ward" has violated any of the fundamental principles of morality, or neglected the rites and ceremonies enjoined by his religion.

## *Chapter 13*

### *JAPAN*

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## Chapter 13

63. *The Justice of the Early Emperors, A. D. 646.*  
*Bell and Box afford easy Access for Complainants.*
64. *A Trial before Oôka, Lord of Echizen, Magistrate of Yedo, A. D. 1740.*  
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*A False Claim of Breach of Marriage-Promise.*
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*The Wayward Wife seeks Divorce via a Nunnery; but at last the Court reconciles all Parties.*

63. The Justice of the Early Emperors, A.D. 645.<sup>1</sup>*Bell and Box afford easy Access for Complainants.*

[All the early autocratic rulers—Emperor, Sultan, Khalif—of the countries of Asia maintained the principle that Justice emanated from the person of the ruler. Thus it was their acknowledged duty to provide free access of suitors seeking redress, and to ensure that complainants should not be turned away or obstructed by the bureaucracy of ministers and clerks who surrounded the throne.

For this purpose the bell-and-box plan was used. It is often mentioned in the annals of China and of India (Chap. 11), and its institution by the Emperor Kotoku in Japan is here described:]

*Daikwa Period* [A. D. 645] *1st year, 7th month, 14th day:* This day a bell and box were provided in the Court. The Emperor issued an order, saying:—"If there be a complainant, in case the person in question belongs to a local baron, let the local baron first make inquiry and then report to Us. In case the person in question has an elder, let the elder first make inquiry and then report to Us. If, however, the local baron or the elder does not come to a clear decision respecting the complaint, let a document be received and placed in the box, and punishment will be inflicted according to the offence. The person who receives the document should at dawn take it and make report to the Inner Palace, when We will mark on it the year and month, and communicate it to the Ministers. In case there is any neglect to decide it, or if there are malpractices on the part of intriguing persons, let the complainant strike the bell. This is why the bell is hung and box provided in the Court. Let the people of the Empire know and appreciate Our intention."

1. From "*Nihongi: Chronicles of Japan from the Earliest Times to A. D. 697*", translated by W. G. Aston; reprint of the original edition published by the Japan Society; London, Kegan Paul, Trench, Trubner, & Co., 1924, vol. II, pp. 201, 211.

2d year, 1st month, 1st day: "The object of hanging up a bell, of providing a box, and of appointing a man to receive petitions, is to make those who have grievances or remonstrances deposit their petitions in the box. The receivers of petitions are commanded to make their report to Us every morning. When We receive this report, We shall draw the attention of the Ministers to it, and cause them to consider it, and We trust that this may be done without delay. But if there should be neglect on the part of the Ministers, and a want of diligence or partizan intrigues, and if We, moreover, should refuse to listen to remonstrance, let the complainant strike the bell.

"There has been already an Imperial command to this effect. But some time afterwards there was a man of intelligence and uprightness who, cherishing in his heart the spirit of a national patriot, addressed Us a memorial of earnest remonstrance, which he placed in the box prepared for the purpose. We therefore now publish it to the black-haired people here assembled. This memorial runs as follows:—"Those subjects who come to the capital in connection with the discharge of their duty to the Government of the Country, are detained by the various public functionaries and put to forced labour of various kinds, etc., etc." We are moved with strong sympathy by this. How could the people expect that things would come to this? Now no long time has elapsed since the capital was removed, so that so far from being at home, we are, as it were, strangers. It is therefore impossible to avoid employing the people, and they have therefore been, against Our will, compelled to labour. As often as Our minds dwell on this, We have never been able to sleep in peace. When We saw this memorial, we could not refrain from a joyous exclamation. We have accordingly complied with the language of remonstrance, and have put a stop to the forced services at various places."

# 64. A Trial before Oôka, Lord of Echizen, Magistrate of Yedo, A.D.1740.<sup>1</sup>

## *The Wise Judge Saves the Innocent Accused.*

[In the first half of the last century, in the great city of Yedo (now Tokyo), lived Oôka, honorary Lord of Echizen,—a judge whose name is acknowledged to be the most famous on the long roll of Tokugawa judges, and whose memory is still perpetuated in tales and traditions dear to the heart of the romance-loving populace. Oôka was fortunate enough to live under a Shogun who was himself a brilliant administrator and knew the value of able servants; and for thirty-five years Oôka continued to dispense justice, first in the City Court of Yedo, and then as one of the two Ecclesiastical Magistrates, whose jurisdiction was national.

It is as a trial judge that his fame is greatest. A wonderful knowledge of human nature, the keenest insight into motives, tact to attain his purpose by indirection when necessary, and, above all, a sympathy for the people unusual in a feudal official, and a rough-and-ready justice appealing to common-sense,—these made him the idol of the people of Yedo, and the personification of judicial wisdom; and there was, to their minds, no case too difficult for Oôka's genius to unravel. The records which have come down to us are encumbered with popular tradition. We could not separate the tradition, if we would; but perhaps it is as well, for if the celebrated cases which are still so eagerly read are not in every respect records of actual events, they at least represent what the Japanese populace of two centuries ago regarded as the ideal qualities of a judge.

The tale here to be told is known as that of]

## *The Flayed Head on the Gibbet.*

There was living in the city of Osaka, about the year 1740, a worthy burgher, by name Hikobei, who followed the occupation

1. From *John H. Wigmore*, "Japanese Causes Célèbres", The Green Bag, vol. IV, p. 563, abridged from a translation by *Walter Deming* of "Oôka Meiyo Seldan" (Oôka's Famous Cases), ed. 1877; translated also in the Japanese Department of Education's "English Reader" (High School Series, Book III, about 1887). There is a later Japanese edition of 1929, ed. Takeshi Osatake, pub. Hakubunkan, Tokyo.

of a dealer in art objects. Lacquer boxes, ivories, bronzes,—these products of the cunning artisans of Kyoto and Osaka were the subjects of his commerce. In the year above-mentioned the times had gone hard with Hikobei. None of his ventures (for his sales were few and he made his profits by investments in promising objects of special rarity and value) seemed to prosper. Towards the close of the year his sanguine heart was excited by the prospect, held out to him by a friend, of retrieving his fortunes in the great city of Yedo, where the feudal luxury of the *daimyo* who congregated there offered a never-failing market for the wares in which Hikobei dealt. His wife and the two boys, of course, must be left behind, in the care of friends, until it should be seen whether the new enterprise was to be successful; and these arrangements made, Hikobei started for the feudal capital, trudging all the way, along the dusty thoroughfare known as the Tokaido,—for even if his means had permitted him to ride, the law of his country would not have allowed a merchant-commoner the luxury of a sedan and bearers.

As luck would have it, Hikobei's opening proved a good one, and customers began to appear in the most unexpected quarters. He was beginning to think of sending for his wife and children, who had felt the separation keenly, when one day an interruption came to all his affectionate plans.

Not very far from the Ryogoku Bridge, the great bond which unites the two heartvalves of Yedo's throbbing life, was the house of an old lady with whom he had become very intimate since his arrival in Yedo. He had first made her acquaintance during a shower of rain, when a pleasant voice had called him in to take shelter awhile as he stood under the dripping eaves trying in vain to escape the drenching drops. The motherly old lady soon won the heart of the lonesome Hikobei, and mutual services cemented the friendship thus begun.

His new friend was the aunt of a certain Ichiyemon, of the Yone House, but lived alone, with only a maid-servant. She belonged, like Hikobei, to the class of tradespeople; but she had managed to save a small sum which, with what her husband had left, gave her a

comfortable subsistence. But her years were failing, and she had already laid aside the contribution to her family temple which should secure a mass for her soul after her death.

On the day above-mentioned Hikobei needed money. He had in sight an excellent investment. In fact, he had agreed to buy the object (on which he hoped to double the sum laid out), and had paid 10 *ryo* as bargain money. He needed 90 *ryo* more, and it was due that night, but as yet he had not been able to raise so large a sum. Determining finally to avail himself of the friendship of the old lady, he asked her for the loan. She shook her head regretfully, and told him that she had no ready money of such an amount. But as Hikobei sadly turned to leave, his visions of profit now melting into air, the generous woman's heart was moved. She called him back, and, going to her cupboard, she took out her mass-money, carefully wrapped in a cloth, and laid it before him. "I was keeping this," she said, "to buy masses for my soul; but you have been my good friend, and since you need it, you shall have it, and shall pay me when you can." That Hikobei overflowed with thanks is to describe his feelings inadequately. The money was taken to the place of his purchase, and the transaction speedily consummated.

That night the old lady's maid-servant spent with a friend in the nephew's house. When she returned next morning, she found that the door was open, and going in hastily there met her sight the body of her mistress, covered with blood and lying motionless on the bed. The neighbors were soon alarmed by her cries, the nephew Ichiyemon arrived, and they found that life was indeed extinct. The murder was apparently the work of a robber; for when the nephew looked eagerly for the mass-money, it was not to be found. "Who knew of this money, outside of the family?" asked Ichiyemon of the maid. "No one, I think," she answered; "unless it be Hikobei, who came last night, by the way, to borrow some money from your aunt." Jealousy, perhaps, aided Ichiyemon in coming without further hesitation to the conviction that Hikobei was the murderer; and he took himself forthwith to Oôka, Lord

of Ichizen, then judge of the City Court, and laid the whole story before him. Nor did he fail to name Hikobei as the undoubted criminal.

Thus it happened that as Hikobei was returning that morning, full of pleasure at his investment, and of speculations upon its profit, his dreams were rudely interrupted by two policemen who had been sent by Oôka to arrest him; and in spite of protestations he was speedily taken, without any word of explanation, before the famous Judge, whom all knaves feared and all honest men trusted.

Hikobei found in the court-room the nephew Ichiyemon, the maid-servant, and some of the neighbors. Ichiyemon first told his story again, and ended with accusing Hikobei as the guilty one. "But," said Oôka, "Hikobei and your aunt were, it seems, the best of friends. It is a most unlikely thing that he should repay such trust and such benefactions with murder. Is there no one else on whom your suspicions fall?" Ichiyemon answered in the negative, and again demanded, with some vehemence, the death of Hikobei.

Oôka turned to Hikobei and said, "How could you do such a brutal act as to kill your benefactress?" Hikobei declared, by all that was sacred, that he was innocent. "Is it true that you visited her yesterday?" asked Oôka. Then Hikobei told him the whole story, beginning with his misfortunes in Osaka, and ending with his arrest on that morning. Through the whole of the recital Oôka, as was his custom, had watched him keenly with half-shut eyes, apparently almost asleep; and by the time the unfortunate man had ended, the master of human nature had made up his mind that Hikobei was innocent.

To save him, however, seemed quite impossible. The circumstances were completely against Hikobei; not one jot of evidence, except his character, appeared in his favor; and the relatives of the dead woman were clamoring for his death. The custom of the times, however, required that no one should be put to death before confessing, and Oôka ordered Hikobei to be put to the torture. Innocence was no proof against torture, and it ended by a full confession of guilt by Hikobei. Sentence of execution was passed; he was beheaded in the prison, and his head was exposed

on a pole at the usual place, Suzukamori. Singularly enough, the face of the dead man had been disfigured by the removal of the skin.

Meantime there was great grief in Osaka. The last letter of Hikobei had told of his hopes for their reunion, and news of the arrangements was daily expected. But for many weeks no news came, and at last, worse than no news, came the rumor of the father's trial and execution.

But the faithful wife never believed it; and the elder boy, Hikosaburo, a brave lad, at last resolved to go to Yedo and seek out his father. Entreaties and tears of the mother availed nothing, and the middle of January found him in Yedo. He first went to the execution place to see if his father's head was there, but the flaying of the face made recognition impossible. Linger there till dusk, he heard footsteps approaching, and fearing to be questioned by some chance policeman as to his errand there, he crouched behind a tree and saw two figures pass him. They were laborers, judging from their dress; and one was saying, "What a pity that was about Hikobei! He never deserved death." "No, you are right; he was innocent," said the other. Hikosaburo started. Surely these men could enlighten him as to his father's fate. He followed them to their house, and told them his name and his story, and begged them to disclose all they knew.

The honest fellows, Sukeju and Gonzo by name, were much touched by the young lad's tale, and their information was soon put at his service. It seemed that on the night of November 17, the night of the old lady's death, as they were returning home very late, they saw in the moonlight a young man of the neighborhood named Kantaro washing a sword in a fire-bucket near the gate. The air was chill, and they passed by rapidly; but it seemed a strange business for Kantaro to be about at midnight, and, as they went out in the morning, they looked into the fire-bucket, and saw that the water was of a blood-red tinge. They thought that it was some quarrel which Kantaro had perhaps been engaged in; until at the bath-house, shortly afterwards, they heard the news of the old lady's murder and of Hikobei's arrest. They never

spoke to outsiders of what they saw, but the private conviction had always remained with them that Hikobei was innocent, and Kantaro the murderer.

The laborers proved good friends to the Osaka youth, and in a short time the matter was again laid before Oôka. The police were sent to arrest Kantaro; but when the fellow was brought into court and questioned, he denied all knowledge of the crime. His wife, however, finally disclosed such damaging evidence of his guilt, that he broke down completely, and confessed to the killing. When passing along the street, he had seen the old lady showing the money to Hikobei, and he had then entered during the night and killed her, for money which he never got.

The real culprit discovered, it only remained to announce the news to the other parties interested. Two days later the judge summoned to court the filial youth Hikosaburo, the nephew Ichiyemon, and the two laborers. When all had appeared, he called them up and said to Ichiyemon: "When your aunt was killed, you demanded the execution of Hikobei as the murderer. But his son has now come up from Osaka, and has brought to me complete proof of his father's innocence! The real murderer was not Hikobei, but a man named Kantaro. I now proclaim that Hikobei was entirely innocent of the crime of which he was accused."

At these words Hikosaburo could not restrain his emotion. The clearing of his father's name had at last been accomplished, and he poured out his thanks to the judge. "One thing only I ask," he continued, "that I may have the body of my dear father given back to me, to be taken to his home in Osaka, and buried where our ancestors lie." But the others in court did not take it so easily. The thought of the innocent man, now gone beyond the possibility of pardon or recall, excited the laborers and their friends who were present, and they began to murmur remarks not at all favorable to the abilities of Oôka. "It is a pity," said one, "that the judge should have been so hasty in condemning to death a man who now proves to have been quite innocent." "Kantaro is punished," said another, more loudly; "but is there no punishment for the official who kills an innocent man?"

Oôka in vain ordered silence. The popular feeling had been aroused by the miscarriage of justice, and the friends of the innocent victim did not restrain their utterances. Finally Oôka made a sign, and before long there appeared at the door a pale figure who advanced between two attendants to the group before the judge. "Hikosaburo," said Oôka, "this is the reward which I offer for your noble conduct in coming to rescue your father." Hikosaburo turned. It was his father!

The two rushed into each other's arms and shed tears of joy, while the others were dumb with amazement. Oôka then told the secret. "When the old lady was killed," he said, "her nephew insisted that the guilty person was Hikobei. Of his arrest, torture, and confession, you all know. But I never once believed that Hikobei was the criminal. His confession, I knew, was made to obtain release from torture. So I determined to save him. A convict had just died in prison; I ordered his head cut off and flayed, and exposed it at Suzukamori, instead of Hikobei's. Meanwhile he lived quietly in the prison, until some proofs of his innocence should turn up. You all thought that he was executed; but here he is, thanks to the noble conduct of his son, and the friendly help of Sukeju and Gonzo, and my conviction of his innocence has been justified. Some of you just now angrily reproached me for my seeming injustice. But I shall take no notice of your disrespectful words, for I know that you were much excited, and on the whole I am glad to have in my town citizens who are not afraid to speak up when they see an innocent man suffer."

With these words he ordered a reward to be paid to the two laborers, while they, now ashamed of their mistrust of the omniscient judge, bowed low and expressed the humblest apologies. When Hikobei and his son left the court and the news of his vindication spread through the city, the people were full of the praises of Oôka and his wonderful penetration and wisdom; and the case has ever since been known as "The Flayed Head on the Gibbet."



## 65. The Village Conciliation Tribunal a Century Ago.<sup>1</sup>

### *A False Claim of Breach of Marriage Promise.*

[In civil cases, a fundamental principle, under the Tokugawa dynasty (A. D. 1600–1868), was that conciliation must precede litigation.

The principle of conciliation resulted thus:

Every town and village was divided into kumi, or companies of five neighbors, the members of which (somewhat as in the Saxon frankpledge or frithborg), were mutually responsible for each other's conduct. In case of a disagreement between members of a company, the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the company would meet and consult over the case.

If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him socially; this usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the

<sup>1</sup> From translations of original documents quoted in *John H. Wigmore*, "The Legal System of Old Japan", The Green Bag, 1893, vol. IV, p. 403.

The introductory passage is borrowed from Dr. D. B. Simmons, "Notes on Land Tenure and Local Institutions in Old Japan", ed. J. H. Wigmore, Asiatic Society of Japan Proceedings, 1891, vol. XX, p. 118.

family or company. A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence.

If even the company-chief could not settle the matter, it was laid before the higher village officers, the elder and the headman. In fact, the chief village officers might almost be said to form a board of arbitration for the settlement of disputes; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring headman.

If the headman was unable to settle a case, it was laid before the local magistrate, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity.

When a case finally came before the magistrate for decision, it passed from the region of arbitration, and became a law-suit. From the magistrate it might pass to the higher courts at Yedo. But even when the case finally came to the magistrate's court, it was not always treated in the strictly legalistic style familiar to us; the spirit of Japanese justice dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

The following documents illustrate the working of the principle:]

Petition to Shinomoto Hikojiro, Magistrate of Koma County. The undersigned respectfully represents as follows:—

Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

Tempo, 10th yr., 2d mo. [1840].

Farmer Uhei, Complainant.

Surety, Asayemon, Headman of Village.

Countersigned, Ichikawa, Deputy-magistrate of County.

Petition for Dismissing the Case. In the matter of Cho, already reported, we beg to file the following petition for dismissing the case:—

Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the

matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you will shut your eyes to the case, and not give it any further consideration.

Tempo, 10th yr., 2d mo. [1840].

Ichikawa, Deputy-magistrate.

Farmer Uhei, Complainant.

Headman Asayemon, Surety.

Farmer Jirozayemon, Defendant.

Farmer Hichibei, his relative.

Farmer Masabei, his company-chief.

Headman Shirozayemon, Warrantor.

Approved: Shinomoto Hikojiro, Magistrate of Koma County.

#### 66. A Husband sues his Parents for the Return of the Fugitive Wife.<sup>1</sup>

*The Wayward Wife seeks Divorce via a Nunnery; but at last the Court reconciles all Parties.*

[This story of a domestic disagreement, taken from the records of the higher Magistrates in Yedo (the old capital, now Tokyo), again illustrates the constant tendency of the Courts of Old Japan to encourage settlement by mutual adjustment.

The sequence of events is as follows, the year being A. D. 1845: Sayo, the wayward wife of Hambei, a merchant of Yedo, deserts him and returns to her family. Hambei sues the father and the mother, Tsunejiro and Yoshi, for the restoration of his wife. The parents finally are ready to yield; but the wife meantime elopes to the house of a mutual friend, and upon being sought there, finally takes refuge in a nunnery attached to the Mantoku (Buddhist)

1. From "Law and Justice in Tokugawa Japan, A. D. 1603-1868"; Part VIII, "Persons, Legal Precedents, Case No. 5", edited John H. Wigmore, published Society for International Cultural Relations, Tokyo, 1941.

Temple, seeking a divorce. A question of jurisdiction meanwhile arises between the Town Magistrate, where the husband Hambei had sued, and the Temple Magistrate, who had authority for Temple divorces. The Town Magistrate finally summons all parties for trial. But while he is endeavoring to disentangle the merits of the case from the contradictory testimony, the parties agree to be reconciled, the case is dismissed, the wife returns to her husband, and all ends happily.

The wife's resort to the Temple nunnery brings to attention an ancient privilege of some of the aristocratic nunneries to receive temporarily a dissatisfied wife whose husband has refused to divorce her; upon shearing her hair like a nun, and remaining in service there for two years, she could be granted a divorce.

The record contains some fifteen documents (testimony, judges' correspondence, etc.), of which only four will here be given; (1) A memorial (by the Tokei Temple, a different one) describing the ancient privilege; (2) The Town Magistrate's preliminary findings in the husband's suit; (3) the same Magistrate's statement of his claim of jurisdiction; and (4) the final instrument of voluntary settlement by the parties.]

[1. *Memorial filed by the Officers of Tokei Temple, A. D. 1805*]

Tokei Temple was founded by the wife of Tokimune Hojo, Lord of Sagami, who, after becoming a nun, founded this temple and had the right of sanctioning divorces granted to the Temple. Later Yodo, daughter of the Emperor Godaigo, became Abbess of the Temple. Later, Tenshu, daughter of Hideyori Toyotomi, held the office of Abbess by the command of Gongen-sama [Iyeyasu Tokugawa], who promised her that he would grant any wish of hers whatever it might be; upon which this merciful lady said that she, being a nun, had no earthly desires, but that nothing could make her happier than that the ancient right of the Temple should be re-sanctioned. Later the palace of Suruga Dainagon was given to the Temple, together with money for repair, and the Temple has been kept in good repair for all these years; so that the guests' quarters, and the Superior's quarters, which were built with the materials taken from Suruga Dainagon's palace, are still to be

seen. The repute of the Temple was such that during the headship of Abbess Tenshu there was frequent correspondence with the authorities, and we still have several of these letters, as well as one telling how through the Temple Magistrate a sum of money was donated to the Temple for the memorial service of the Abbess after her death. As for the Abbess of the Temple it had long been the custom for the ladies of the House of Koga Kubo to hold the office, until Abbess Tenshu was ordained. At present, the office has been held in succession by the daughters of the House of Kiregawa.

The right of the Temple in question is that by which the Temple has, since the time of the founder, authorized the divorce of any wife who took refuge in the Temple by reason of dislike toward her husband. It is a right vested in the Temple, out of pity for a woman who must subject her own desires to those of her husband even when he is a bad man, and must thus continue all her life to pass a miserable existence. By this Temple right, when a woman takes refuge in the Temple we make a scrupulous investigation into the possibility of her returning to her husband; but if the woman insists on being divorced, we feel obliged to listen to her petition. We then notify her husband and the superior officers concerned that if the woman has violated any law of the land and there is any charge pending against her, the accuser or accusers may come to the Temple with the proofs thereof; if there is no such charge, we request [the husband] to hand the instrument of divorce. (In case a woman disregarding the Temple regulation goes to some official and obtains a divorce after proper legal procedure and then comes to the Temple, such a woman gets the divorce by her own act.) It is required of the woman that she serve in the Temple for twenty-four months, as if she were in service to her husband; after which, if the regulations of the Temple have been fulfilled, she may be received back in her parents' house, and may marry again, by virtue of the Temple regulation.

The Temple does not take in persons who have violated the laws; if such a person should come, we would willingly surrender her to the authorities on demand. Such a person might indeed flee here,

to escape from the world outside, and might beg to be taken in, saying that if she is not received, she is ready to commit suicide. In such a case, the merciful regulation of the Temple, as well as the charity of religion, cannot ignore her sufferings, and so we would take her in without first asking consent of the authorities on the matter. However, we have never been obliged, thus far, to give protection to such persons.

The ancient custom with us has been that women, without any instrument of divorce, could take refuge in the Temple and after fulfilling the prescribed duties, return to their parents, freed from the marriage tie. But such women were sometimes still pursued by their former husbands ignorant of the right of the Temple, and disputes often arose. So we went to the Temple Magistrate Nagai, Lord of Iga, some years ago, and were told that we should without fail see that instruments of divorce be handed by the husbands, and instruments of settlement of the case likewise from the parents, and we have ever since done so.

Tenth month

Officer of Tokei Temple  
Yosoyemon Omura

[The wife having resorted to the nunnery, the Temple officers filed with the Temple Magistrate a request to authorize the divorce. The Temple Magistrate reports this to the Town Magistrate, asking about the status of the husband's action in the latter's Court. The Town Magistrate sends to the Temple Magistrate in reply a letter reciting his preliminary findings, as follows:]

[2. *Town Magistrate's Preliminary Findings*]

Hambei, tenant of Motosuke, Hon-machi, 2-chome  
Plaintiff

Tsunejiro, tenant of Tokubei, and  
Yoshi, wife of the foregoing, both of Kobiki-cho,  
3 chome  
Defendants

The above Hambei brought suit before me on the 28th day of the 4th month, and on my demanding the reason, he stated as follows: The above Tsunejiro and his wife kept Sayo, wife of Hambei [and daughter of Tsunejiro], in their house without Hambei's consent and would not return her to him, so that he brought action

some time ago before my colleague Nabeshima; who after examination, and urging the parties to consider their true interests, dismissed the case on the 21st of the same month, to be settled out of court by Sayo's returning to Hambei's house. However, after this settlement, as it was already evening, Hambei left Sayo in charge of a relative of his, Eizo, a keeper of the mills at the storehouses of Matsudaira, Lord of Tamba, and they all went home. On the following day, the 22nd, Tsunejiro and his wife sent a forged letter to Eizo, asking him in the name of Hambei to deliver to them the woman, whom they would shortly come to receive. Eizo, suspecting a forgery, went to Hambei to make sure of the matter, and while Eizo was on his way home accompanied by Hambei, both astounded by the forgery, the woman was taken away. So they went to Tsunejiro and his wife, and sought to negotiate with them; but the latter would not give back the woman. Such being the case, I indorsed a summons and heard all parties together on the 7th day of the 5th month.

What the defendants, Tsunejiro and his wife stated then was this: It was the woman who asked them to come to Eizo's house for her with a letter bearing the name of Hambei; so thinking that she had negotiated with Hambei and settled the matter, they went to get her, bringing such a letter, and took her away. However, on their way home, the woman ran away, and while they were searching for her, the plaintiff [Hambei] came to demand her. Meanwhile, a summons came to them from the Mantoku Temple; for the woman had now taken refuge in the Temple and demanded that the Temple regulation about divorce be given effect in her case.

The parties defendant assert that they took off Sayo from Eizo's house in good faith, without first negotiating with Hambei, because the request to take her away came from the woman herself. But they were certainly at fault for losing custody of the woman on the way. As for the forged letter, it came from Sayo [the wife], and they went to get her in the belief that Hambei had assented; they also affirmed that they were entirely innocent as to Sayo's taking refuge in the Temple; they were simply deceived by her.

So they now declared that they would have Sayo brought back from the Temple, and after rebuking her they would return her to Hambei. Upon this undertaking of theirs I consented to the postponement of the case.

Since then they have gone several times to the Temple, and remonstrated with the woman, who however refuses to change her resolution. However, both the plaintiff and the defendants now demand that this headstrong woman who, by forging a letter bearing her husband's name, deceived Tsunejiro and his wife should be brought back from the Temple and put on trial.

I am unable to make a final decision at this stage of the case. But what I now think proper is that, although there have been here no precedents for such a case, and there may be Temple customary regulations that cover this case, at any rate this headstrong woman, who by forging a letter bearing her husband's name, deceived even her own parents, should be summoned and put on trial; otherwise the strict enforcement of law will suffer. I therefore consult you, asking whether you would not order the Temple officers to surrender the refugee and bring her to my Office.

[The Temple Magistrate and the Town Magistrate now enter upon a polite but lengthy correspondence, each however claiming jurisdiction of the case. The Town Magistrate's statement of his claim is as follows:]

### [3. *The Town Magistrate states his Claim to Jurisdiction*]

You refer to the complaint of the Temple officers as to the disregard of the Temple regulations by husbands who unreasonably demand the surrender of refugees. But my opinion as to the surrender of this refugee is this: Since the woman had already been sent back to her husband, after the consultation at the Town Magistrate's Office, and was then taken away from the custodian's house by means of a letter forged by all the defendants, and then again ran away, she should now be compelled to come back. The husband's petition to recover the woman is well founded, and the surrender of the refugee is demanded by law and not simply because the husband asks for it.

It would be unreasonable in the circumstances to treat this case otherwise. I see no reason to allow so unconscionable a woman to remain in the Temple. She should of course be brought to the Magistrate's Office, and there is no reason for leaving the Temple regulation to control this case.

As you remark, the Magistrates' Offices form a single institution, so that it does not matter which court tries the case. However, if we hand over the case to your [Temple Magistrate's] court, on the ground that the petition had been filed by the Temple where the woman took refuge before Hambei brought his suit [in the Town Magistrate's court], it would be contrary to the usual way of disposing of such cases; for your court is not the place for the trial of such a case. Moreover, Hambei's demand for a trial makes the forged letter one of his grounds of complaint, and unless we compare the testimony of all parties at the same time, it will be hard to get at the truth of the matter. There have been many instances of the surrender of a refugee by the Tokei Temple of Matsugaoka after a joint-consultation on the disposition of the case. At any rate, the case can be decided only after ascertaining the truth. So on careful consideration, I am now of the opinion that this case may best be tried in my [Town Magistrate's] court.

However, I suggest that you inquire further whether there has been any precedent of such a case in your court. Meantime I will keep the petition filed by the officers of the Mantoku Temple, as it is only a copy. So I invite your opinion on the foregoing statement of the case.

[Finally, after the controversy has been pending for several months, all parties agree on a settlement, and file the following document reciting the true story of the facts, reporting that the wife has come back to her husband, and asking that the case be dismissed:]

### [4. *The Parties File an Amicable Settlement*]

We felt obliged to bring suit before your lordship on the 28th day of this fourth month, and our petition was given an endorsement [for summons] dated on the 7th day of the 5th month, so that both parties presented themselves on that day, and, the de-

endants handing in their written answer, the trial proceeded. However, this woman Sayo had taken refuge in the Mantoku Temple, Tokugawa-go, Joshu, and invoked the Temple law of divorce, and on the 25th of this 4th month, a summons came from the officers of the Temple for Tsunejiro together with his relatives and five-company-men, to come at once to the Temple. After reporting the matter to your lordship, the parties summoned went to the Temple; and on their stating that Hambei, as a party, ought to be consulted as to giving effect to the Temple law of divorce, the officers of the Temple told them to go and ask Hambei if he was willing to come to a private settlement, and then come back to report the result. So they went home and reported the matter to your lordship. Repeating their request to the Temple for the postponement [of decision] the two parties consulted often, but, unable to come to terms, they brought suit before the Temple Magistrate, Naito, Lord of Kii, and then Sobei Mine, the Temple officer, came to your Magistrate's office, accompanying Sayo who was consequently placed in charge of Tsunejiro and the ward-officers. Then the above Denjiro, and also Yuzo, tenant of Yohci, whose house fronts the Eitai Temple, Fukagawa, were summoned to be witnesses, and, after the statements of all were compared, we were put to trial.

To sum up the facts once more: Hambei, on the 21st day of this fourth month, about to take back Sayo, but being benighted on the way, left her in charge of his acquaintance, Eizo, the mill-keeper of Matsudaira Lord of Tamba, and went home alone. However, on the following 22nd day, Sayo, saying that she had to see her mother for some urgent reason, asked Eizo's wife to send for her, and on Eizo's wife's complying with the request, Sayo's mother, Yoshi, and Denjiro, both went at once to Eizo's house, and saw Sayo, who said that she could not possibly come back to her husband's house as it would result in dreadful distress if she was taken back to him. So Yoshi and Denjiro expressed their desire to Eizo to take back Sayo to [her father] Tsunejiro.

But Eizo insisted that as Sayo had been placed in his charge by Hambei, he could not hand her over to them unless they at least brought a letter from Hambei. Denjiro, thereupon, went to Ham-

bei and said that, by Sayo's request, her mother had been to see Sayo and heard her make some rash statements, so that the mother proposed to take her home now and, after remonstrating with her until she was convinced of her fault, to send back Sayo to her husband; so Denjiro then requested Hambei to write a letter to Eizo asking him to hand over Sayo to her mother. Hambei, much occupied in business matters, and misunderstanding Denjiro, who, he thought, meant that Yoshi wanted to see Sayo at Eizo's house, entrusted Denjiro with authority to handle the matter, for the reason that he was too busy just then with the business of his trade. Denjiro, wrongly believing that Hambei consented to his request, went to an acquaintance of his, had him write a letter in Hambei's name, and taking it to Eizo, got Sayo away.

At Tsunejiro's house, her parents remonstrated with Sayo, but she refused to return to Hambei, and in such a determined way that the parents feared that if she was forced to return, she might resort to extreme measures [of suicide]. As Sayo then expressed her desire to take refuge in Mantoku Temple, Tokugawa-go, Joshu, and invoke to its law of divorce, the parents, wrongly indeed, thought that Hambei might give up Sayo if the matter was carried to that point. So, after consultation of all concerned, Sayo, accompanied by Denjiro, took refuge in Mantoku Temple, and Denjiro came back alone.

The plaintiff Hambei, upon being told by Eizo that Sayo had been handed over pursuant to a letter written in his name and brought by Denjiro, came at once to Tsunejiro to complain, and, upon Tsunejiro's vague answer, he rashly concluded that all of the above four had together plotted this trick, had forged a letter bearing the appearance of Hambei's handwriting, had kidnapped Sayo and hidden her away. So he brought action before your lordship. But now both parties have all their misunderstanding cleared up as to the forged letter and the kidnapping of Sayo, and the plaintiff has shown us how there was misunderstanding on both sides, and thus the wrongful continuance of the dispute has led to such grave consequences, and we now all acknowledge the plaintiff's statement with humiliation.

The matter standing thus, we have consulted anew, and an instrument of sincere apology having been signed and delivered by Tsunejiro and his wife, as well as by Denjiro—to say nothing of Sayo's apology, which was a matter of course. The dispute has been brought to an end at a final interview of both parties, on the following terms: That Sayo should return to her husband, repenting of past misdoings, which she will never repeat in future. So Sayo has been restored to the plaintiff Hambei, the witness being Yuzo, middleman for their marriage.

Since the dispute has been thus settled, we have no need for any further trial, so that we beg to be allowed to settle the case out of court, as both parties have nothing further to complain of. We herewith appeal to your Lordship's special grace to discharge Sayo from custody and to dismiss the case. We shall then settle the matter out of court with Your Lordship's consent, and shall forever rest indebted to your enlightened government. Therefore, for future reference, we file herewith an instrument of settlement.

[Signed]

*Plaintiff*, Hambei, tenant of Motosuke, 2-chome, Motomachi  
House-owner  
Five Men Company  
Headmen .

*Defendants*, Tsunejiro, tenant of Tokubei, Kobikicho.  
Yoshi, wife of above  
Sayo, daughter of above  
Denjiro, witness, of the same domicile  
House-owner  
Five Men Company  
Headman

To the Magistrate's Office

## Chapter 14

# MONGOLIA

## MONGOLIA

67. Trial of an Explorer in A.D. 1930.<sup>1</sup>*The Sacrilege of Killing a Sacred Horse.*

[Henning Haslund, a leading member of the great Sven Hedin's West China Exploration Expedition of 1930, was exploring the Altyn mountains, inhabited by a powerful Mongol tribe. When hunting one day, he had shot and killed, by mistake for other game, two horses of a breed sacred to the Mongols. A malicious Mongol, Yetum by name, informed against him. Haslund was notified to appear before the tribal council of magistrates on a day appointed.]

All joy had deserted our camp in face of the doom which might cut short the expedition on which we had set out with such high expectations. We went through all my arguments in defence, but, think as we would, the fact remained that next day I was to be judged by Mongols, and that by the law of the Mongols I was a criminal.

The Court, which consisted of the chief and five grave Mongols, sat in judgment in our tent, and their train of soldiers and lamas filled the space around it. My antagonist was attired in costly lama's robes, and arrived attended by his suite and a crowd of curious people, who clearly showed their sympathy for him and against me.

Bergman and I took up a position in the northern corner of the tent, and my opponent and his suite sat opposite. The soldiers crowded the entrance, and outside could be heard the loud discussions of the anxious and angry crowd.

I based my defence on the facts that I was not a Mongol, had never been in those parts before, was ignorant of the laws of these people, and therefore could not be judged according to them. I had shown my regret as soon as I perceived my mistake, as was

1. From *Henning Haslund*, "Men and Gods in Mongolia", E. P. Dutton & Co., New York, 1935, p. 195.

## Chapter 14

67. Trial of an Explorer in 1930.  
*The Sacrilege of Killing a Sacred Horse.*



proved by the fact that I had informed against myself and offered compensation to the owner of the two horses, although I might have kept the affair secret, in which case the owner of the horses would have been the poorer by their value.

I concluded my address by bringing out the compensation I offered, and the assembly grew silent at the sight of my silver *yamba*.<sup>2</sup>

The chief and his five counsellors carefully considered my words behind the cloud of smoke from their long pipes, and the soldiers in the tent-opening repeated my speech to the multitude outside and described the lustre and weight of the lump of silver. Yetum conferred in whispers with his suite, and then his greed took the upper hand, and he declared himself willing to settle the matter for three such silver pieces.

This was an impudent price to demand, for two horses which had long since run away from his herd, and if I gave in to his effrontery we would become a laughing-stock to the whole population and would certainly be subject to extortion throughout our stay.

I therefore declared that my offer was adequate and that I would not pay an ounce more. But at that my adversary's hatred flared up again, and he began his attack. In shrill tones he flung out the most venomous accusations against the white invaders, represented us as the incarnation of all evil come to disturb the peace of the grazing-grounds and plunge the nomads in disaster, and, incited by the applause of his followers, worked himself up into a violent rage. We had broken the laws of the steppe; the punishment both of the gods and of the nomads was upon our heads.

The impressionable Mongols were fired by his fanaticism, and, shouting for vengeance, they swarmed into the tent. Rancorous glances and threatening fists were directed at us; they closed in on us, and it was impossible to make ourselves heard.

Our position was critical and might at any moment become disastrous.

2. *Yamba*; a lump of silver shaped like a horseshoe, weighing four pounds.

My thoughts sought wildly for some way out of the situation. Images of shamans [wizards] and lamas [priests] and their devices, which impress the nomads as marvellous mysteries, passed in review through my brain, and all at once I remembered the teachings of an old lama during a long winter spent in the forests of Northern Mongolia.

And then I became a Shaman!

Unending streams of Tibetan formulas rolled over my lips while with my hands I traced mystic figures in the air. Sometimes I mixed lines of European verse with my Tibetan text, and the lamas present marvelled at my knowledge of their formulas and made an effort to grasp the incomprehensible.

I fixed a piercing gaze on my enemy in the middle of his sweating forehead; my chanting voice rose and fell and at times passed into wild shrieking. Dead silence fell over the multitude; they sought my wonder-working gaze and followed its direction. My enemy shifted nervously, and his eyes looked over the crowd, but everywhere they met glances all of which were fixed upon his forehead.

Suddenly my prayers ceased, and I bent forward with outstretched arm so that my forefinger almost touched the point on his face at which all were staring: "You see," I shrieked, "You see the sign upon his forehead, the mark which there signifies the curse of the gods!" And they all saw it.

My victim shook with terror and clutched at his forehead. And then I pronounced his doom:

"Desire has created your wealth and the power you have won among your fellows. But I am sent hither by mighty gods to prove your sense of justice, and I have found only hatred and desire. You are under the curse of the gods; your punishment begins this day and shall continue until you have acquired the good qualities of the spirit. This day you shall pay me a sheep, and you shall continue to lose cattle until you amend your ways, and if you persist in evil, in two years you shall be a destitute man."

Then I commanded him to separate himself from all honest folk, and he fled from the tent followed by the scornful looks of the crowd.

I had drawn my bow taut, and it had stood the strain. For a while the atmosphere in the tent was charged with suspense; the gaze of all rested uncertainly upon us, and no one spoke a word.

But after we had handed the lump of silver to the chief, not as a fine but in token of friendship, and treated all those present to tea and tobacco, the tension relaxed, and they began to entertain us with stories of Yetum's sinful life, which explained the punishment of the gods that had now fallen upon him.

## *Chapter 15*

# *TURKEY*

## TURKEY

68. A Trial before the Grand Vizier at Stamboul, A.D. 1600.<sup>1</sup>*The Sultan Watches through a Latticed Window.*

[The spectacle at the divan in Stamboul, and the procedure of the Grand Vizier in the 1600's, when administering justice there on behalf of the Sultan—and under his very eyes, indeed—has thus been described by an English eye-witness:]

This Divan is called publike, because any kinde of person whatsoever, publicly and indifferently, may have free accesse unto it to require Justice, to procure grants, and to end their causes and controversies, of what nature, condition, or import so ever they bee. . . . The Divan dayes are four in the weeke; viz., Saturday, Sunday, Munday, and Tuesday, upon which dayes the Chiefe Vizir, with all the rest of the Vizirs . . . all which aforesaid Officers, from the highest to the lowest, are to be at the Divan by breake of day.

The Vizirs being come into Divan, doe sit within at the further end thereof, with their faces towards the doore, upon a bench which joyneth to the wall, every one in his place as hee is in degree . . . . And in the midst of the roome doe stand all such as require audience of the Bench.

Now being all come together, and every man set in his owne place, forthwith the petitioners begin their suites, one by one (who have no need of attorneys, for every one is to speake for himselfe) referring themselves to the judgment and sentence of the Chiefe Vizir, who (if hee please) may end all; for the other Bashawes doe not speake, but attend till such time as hee shall referee any thing to their arbitrimint, as oftentimes hee doth, for hee having once understood the substance onely of the Cause (to free himselfe from too much trouble) remits the deciding of the greatest part to others

1. From Robert Withers, "The Grand Signior's Seraglio", in "Purchas his Pilgrims", vol. IX, p. 385 (Glasgow, MacLehose, 1905).

## Chapter 15

68. *A Trial Before the Grand Vizier at Stamboul, A. D. 1600.*  
*The Sultan Watches Through a Latticed Window.*
69. *Turkish and English Procedure Compared, A. D. 1660.*  
*An English Merchant Praises Turkey's Justice.*

. . . so that after this manner he doth exceedingly ease himselfe of so great a burthen, which otherwise hee alone should bee enforced to undergoe; reserving onely to himselfe that which hee thinketh to bee of greatest import and consequence. And on this wise they spend the time untill it bee noone; at which houre (one of the sewers being appointed to bee there present) the Chiefe Vizir commands that the dinner bee brought in, and immediately all the common people depart. . . .

Dinner being ended, the Chiefe Vizir attendeth onely publique affaires, and taking Counsell together (if hee pleaseth and thinketh it fit) with the other Bashawes; at last, he determineth and resolveth of all within himselfe, and prepareth to goe in unto the Grand Signior . . . and so they goe in unto the Grand Signior, to give account and make him acquainted with what hath passed concerning their Charge. . . .

The Grand Signior's Predecessors were alwaies wont, and the present one sometimes, commeth privately by an upper way to a certaine little window which looketh into the Divan, right over the head of the Chiefe Vizir, and there sitteth with a lattice before him, that he may not be seene, to heare and see what is done in the Divan . . . and by this his comming to that window, the Chiefe Vizier (who alwaies standeth in jeopardy of losing his head, upon any displeasure of the Grand Signior) is enforced to carrie himselfe very uprightly and circumspectly in the managing of his affaires.

#### 69. Turkish and English Procedure Compared, about A.D. 1660.<sup>1</sup>

##### *An English Merchant Praises Turkey's Justice.*

[Dudley North, Baron North, had several sons, four of whom became eminent; one of these four, Roger, wrote the lives of the other three. The first was Francis, who in 1664 became Chief Justice of the Common Pleas, and in 1682 Lord Keeper of the Great Seal, under Charles II. The second, Dudley, became a merchant and spent many years in Turkey; later he was made

1. From *Roger North, "The Life of the Honorable Sir Dudley North"*, ed. 1744, p. 43.

Commissioner of the Treasury, and published some advanced views on political economy. Roger, in this life of Dudley, usually calls him "our merchant."]

\* \* \* As to the law part of his [my brother's] business, it was so much, as in the end, gave him a competent skill in the rules and methods of the Turkish justice; whereby, in common incidents, he could advise himself, and assist his friends. \* \* \* I have heard our merchant say, that he had tried, in the Turkish courts, above five hundred causes; and, for the most part, used no dragomen, or interpreters, as foreigners commonly do, but, in the language of the country, spoke for himself.

Having said thus much of our merchant's dealings in the law, it may not be amiss to add what I have heard him say concerning the law itself. \* \* \* Every person, even the government itself, and all its ministers, must stand to the law, whatever the quality is, the grand signor's person (perhaps) only excepted. For, in the whole empire, of right there is neither prerogative nor privilege; the least person may take the greatest basha below the girdle (for above is an assault) and say, come to the noble law; and if he refuseth, he is in great danger of being ill used by the people, who have an extreme veneration for the law, and will compel every man, that is required, to go before a judge. \* \* \*

Another sovereign virtue of the Turkish law is, that every man is his own bailiff and summoner, without the plague of process, returns, alias, pluries, and I know not what hooks and crooks, that often beggar a suitor, before he can bring his adversary to answer him. But a man, as was said, requiring the adversary to be before the judge, he must, without shift or delay, go; and, if he offers to escape, a thing scarce known there, he must run quite away; for the very people will almost destroy him, if they catch him. Here is no suing out a writ, going to the sheriff, from him to the bailiff, with a farther train of ill consequences I am ashamed to remember. And it is a prodigious wonder that, in a civilised country [like England], pretending to liberty and laws, men should so little consider, that all the court process of law had its original in conquest, and the consequent tyranny of the conquer-

or, who made himself the vender of common justice; and the trade is still kept a-foot by corrupt interests; and after all that they should idolise this dreg of slavery, and blindly support a direct oppression of themselves, as if it were really an happy economy of justice and liberty.

Another virtue, and a singular one, is that no man answers by attorney, but in proper person only. The course is, when the parties come before the judge, the plaintiff makes his demand, for money lent, the price of goods sold, or the like. The judge sits all the while with his paper upon his hand, and writes his minutes. What say you to it? says he, to the other; and then he makes his defence. If there be a writing shewed, the defendant fails not to own it; there are not *non est factums*, for pure delay, to be tried. It is there infamous in the greatest degree, for a man to deny his writing, when shewed to him before a judge, or indeed any matter of fact that is true, after it appears to have been so to his knowledge. What a vast retrenchment of delay and charge is this? Men, answering in person, can scarce be brought to speak false; they must be strangely abandoned to all shame, that, in the face of a court, without stammering or blushing, will do so. Whereas, when they sit at home, and leave their attornies and counsel to plead for them, there shall be false pleas, for delay professedly, and no concern at all to their countenances. \* \* \*

Another admirable virtue of the Turkish law is, that decrees or decisions never fight one with another, and yet the party hath the benefit of an appeal. They call their decree an odgett, which is a small scrip, or ticket, which the judge writes upon his hand, and gives out to the party that hath obtained sentence. After this odgett made and signed, and given out, no judicature, or authority in the empire, can question, or discharge, the matter, or the effect of it; not the great Divan, although the odgett were made by the meanest judge in the empire. This seems to resemble the laws of the Medes and Persians, when a decree might not be revoked. It is certain that, in Turkey, there cannot be more than one odgett, or decree, in one and the same cause. A Turkish judge would

laugh if he were told of our judgments, writs of error, and error upon error, appeals, reviews, etc., with full and entire sentence of the cause pronounced in all, and the latter giving the former ill language, and looking as if a judgment in a cause were but a foundation, whereupon to commence a new suit, to the incomprehensible delay, and expense, wherewith the parties, their heirs and assigns, are tormented. But it will be said, How then can the parties have an appeal? As to that, if either side thinks the judge unskilful, or partial, at any time before odgett made, he may appeal to a superior judge; and then the cause is as if it had not been heard, but the parties go before the judge by appeal, as if the cause originally came before him, and then he makes the odgett; but whoever makes it, the odgett is irreversible. \* \* \*

One thing more I will venture to alledge in favour of the Turkish law, which is of admirable use, and that is their dispatch. A cause seldom lasts a week; and very often is opened and determined in a day; and there is scarce any means to prolong it, but demanding time to produce testimony to facts, about which the parties happen to differ, and their alledging and answering for themselves orally before the judge keeps down difference of facts. For the pride, or shame of the parties, as well as integrity, will make them save proving, and, for the most part, own what they know to be true; and so bring the matter in judgment upon the right point. I have heard much of aiding public credit or trust among men; but believe it is not to be had without contriving some methods of law and justice that may entirely satisfy them.

In Turkey, diving is a trade, and, as it were incorporated, and, as other trades, hath its master who judgeth the divers according to certain regulations. And better justice is to be had, before him, against any of the trade, than is to be expected here from a confederacy, as will appear by a short story, which concludes this paragraph. Our merchant told us, that once a man, coming over from Pera, near the key at Constantinople, dropt a purse of money, which is about one hundred pounds. Thereupon they sent for a diver, and he went down, and busked about a long time, and then came up and said there was no such thing. They were so sure

of the place where the money was dropt, that they believed they had got a rogue of a diver, and immediately sent for the master, or governor, of the divers. He came with a retinue of divers, and sat him down upon the key, and heard testimony in form, as if he had been a judge. Then he commands two of his choice attendants to go down and bring up the money. They went and found that the other fellow had taken it from its place, and hid it behind a timber that belonged to the key. The master took his premio, gave the merchant his money, and for justice and example, laid down the roguish diver, and had him drubbed before their faces; and so he went away in the same state as he came.

It may be objected here, that this proceeding is precipitous, and (corruption apart) for want of advice and deliberation of the parties, as well as on the part of the judge, wrong may be done; and justice is a sacred thing, and ought to have the greatest regard. It is granted, that justice is a rare thing, if it may be had; but if it is to be gained by sailing through a sea of delays, repetitions, and charges, really it may be as good a bargain to stay at home a loser. A wrong determination, expedite, is better than a right one, after ten years vexation, charge, and delay. A good cause, immediately lost, is, in some respects, gained; for the party hath his time, and tranquillity of mind reserved to himself, to use as he pleaseth; which is a rare thing, in the opinion of those who have felt the want of both, and of their money to boot. The reason, why justice is so sacred, is not because the cause of suit, or thing claimed, in itself, is of any great regard, (for that argument will bring all things to a levelling, as why should one man have too much, and another want?) but because it preserves peace and quietness among men, which is the greatest of all temporal good things. And consequently wrong judgments soon, and final, have the virtue of justice, because peace and quietness is thereby preserved. But delays have an effect directly to the contrary; for those maintain feuds and hatred, as well as loss of time and money; so that, if it be said that, in the end, justice is secured thereby (which I do not grant) I answer it is done by unjust means, and comes to the same. But is it not a sad thing, (say some,) for a

man to be hurried out of his right? I answer, Is it not a sad thing a man should have a fever? As the body, so the estate, must be obnoxious to infirmities; there is no perfection in either state; and that is always best which is shortest, and hath the least anguish and pain.

I shall alledge but one instance farther, where I think the Turkish law is remarkably distinguished, and is on the criminal side. \* \* \* It is executed with such rigour, as keeps down offences so effectually that, in that great city of Constantinople, there are not so many men executed for thievery in some years, as in one, nay, I may say, in one sessions at London. If a thief is caught, they make more account of him by discovering others, than by the example of his punishment. And they handle him at such a rate, that he cannot but discover all he knows. He shall sometimes be secretly chained to an officer, and so go about the city, and whom he points to, is taken up. The first thing done, is to see that he makes full amends to the person robbed; and when that person declares he is satisfied, he is sent away with a menace, that he concern not himself for favour to that man. And after all, what hath this poor thief to reward him for all his ingenuity, and service to the public by discovering? Nothing but to die without torment; for if the judge be dissatisfied of his behavior, he makes such a public torture of him, as must terrify all rogues from the like practices; otherwise he is committed to an officer to be simply hanged, and then that officer takes him into the street, and chooseth what man's sign or post he pleases, and constrains whom he thinks fit, to perform the ceremony; and a Frank, if he comes by un luckily at that time, is not safe from being preferred to the employment.

There is a common opinion [in England] that Turkey hath no law nor property, but the will of the powers, there, is the law to the people; and how intolerable is it, say they, that one single judge, sitting upon his legs, determines every man's right? And how obnoxious is that constitution to be corrupted? Whereupon there is ground to say the very justice of the country is slavery.

Yet in answer to this, two things may be alledged. First, that it is impossible politically to contrive, that he, who hath power to judge right, should not have also power to judge wrong, and, by one means or other, be bribed or corrupted so to do. Secondly, it is a question, whether, in experience, the ordinary checks by the European laws, set up to controul this arbitrary power of judging, by numerous forms, dilatories, processes, offices, allegations, and probations without end, to say nothing of errors and appeals touched before, are found to have much mended the matter? I shall not stay to enlarge in answer to this question, because I would offend none, nor give too much occasion to be thought either petulant in depreciating the laws of our own country, or treacherous in seeming to undermine what many (however mistaken) think the security of their liberty and properties.

## *Chapter 16*

### *SUNDRY REGIONS*

## SUNDRY REGIONS

### 70. Trial of an English Sea-Captain in Siam in the early 1700s.<sup>1</sup>

#### *Saved by a Clever Question.*

[A realistic glimpse of the trial-methods in Siam in the early 1700s is given us by a Captain Hamilton, who was himself brought to trial there on a charge. Hamilton, relying on an earlier treaty between England and Siam, had gone to that country to trade, but was not permitted to do so, owing to the intrigues of a crafty Persian agent of the English governor at a Burmese port, revoking the treaty. Hamilton's conversations with the Persian, protesting against this treatment, brought him into trouble, as he thus relates:]

This Persian (whose name was Oia Sennerat) and I were discoursing one day of my affairs in the Industan language, which is the established language spoken in the Mogul's large dominions, and, among other things, I was laying down to him the difficulties that might attend the King of Siam's trade, carried on from Merjee to Fort St. George, because if the rest of the English colonies were forbid trading with Siam, they had just cause to forbid his subjects to trade to Fort St. George, or anywhere else, and that other troubles might arise to the king's affairs, *by thus imposing on the King*, who was ignorant of the consequences that might follow in breaking the agreement made in England without so much as once giving warning to the English colonies of other parts of India.

About a week after, I had a summons to appear before a tribunal, to answer to an indictment of speaking treason of the King. I knew myself innocent, and appeared at the time appointed, which was about eight in the morning. The court was held in a large, square, oblong hall, open on all sides. About nine the judge came with

1. From Captain *Alexander Hamilton*, "A New Account of the East Indies", chap. XXXVI (Pinkerton's "Collection of Voyages and Travels", vol. VIII, p. 472, London, 1811).

## Chapter 16

70. *Trial of an English Sea-Captain in Siam in the early 1700s.*  
*Saved by a Clever Question.*
71. *Justice Among the Fur-Hunters of the Arctic Circle.*  
*Murder punished by Burning Alive.*
72. *Justice in the Mountain Fastnesses of Szechwan.*  
*A Ruthless Method of Extracting the Truth.*
73. *Stern Impartial Justice among the Druses of Lebanon.*  
*The Chief sanctions the Execution of his Own Brother.*
74. *Settlement of a Blood-Feud among the Afghans.*  
*The Sister acts as Avenger.*
75. *Cruel Justice of an Ameer of Afghanistan.*  
*The Ameer eats his Ice Cream, while 400 Rebels have their Eyes Put Out.*
76. *Reforming Old Trial Methods in Old Korea.*  
*Witnesses Willingly endure a Beating.*
77. *Trial of a Suspect in War-Time in Outer Mongolia.*  
*A Russo-Chinese Tribunal condemns a German Engineer.*
78. *Some Episodes of Consular Extra-territorial Justice in the Orient.*



some thousands of attendants, and, as he passed by me to take his place, he viewed me very narrowly, as I did him with much attention. He was a man of a middle stature, about 50 years of age, of a pleasant but grave countenance, and had a quick sparkling eye. He spoke to my interpreter, to bid me have a care of my tongue, lest I should prejudice myself in answering to intricate questions. I thanked him for his admonition, and told him, "A word to the wise was sufficient".

Having placed himself, he ordered my indictment to be read, which was accordingly done, and in about half an hour's time it was ended. He asked me by my interpreter, if I understood what was libelled against me. I answered, "No". He then bade the interpreter inform me of the meaning of each particular paragraph, as they were read a second time with deliberation, and, having heard my impeachment, which was grounded only on my saying, "*That the King had been imposed upon*", I thought fit to deny all, and put my adversary Oia Sennerat to prove that I had said so; but, by the bye, I found, that saying the King of Siam was capable of being imposed on, is rank treason.

The judge chose out of the assembly two procurators for each of us; and there were no small debates, for three or four hours, "Whether or not a stranger, who was ignorant of the laws of Siam, could come under the penalty annexed to the transgression of their laws, when they were broken through ignorance, and not with design;" but my antagonist at last carried it in the affirmative, though the judge seemed to incline towards the opinions of my advocates.

Then the judge put Oia Sennerat to prove what I was accused of, and he produced two of his own servants, who stood at some distance when we were discoursing of my affairs; but my advocates challenged the laws of Siam for their insufficiency, for that law admits not of a servant's testimony, either for or against his master. Then he proffered to bring an undeniable witness against me, who was the only person with us when we discoursed, and that was Collison, who was presently sent for, and being set by my adversary, the judge asked him by the interpreter, if he was present

at such a time, when Oia Sennerat and I were in warm discourse. He answered, he was. He then interrogated him, if he had heard me say in my discourse, that the King had been imposed on. He affirmed he had; on which I perceived a cloud overspread the judge's countenance, and many others who had come to hear the trial seemed sorrowful.

After a little pause, the judge, by the interpreter, asked me what I had to say to Collison's evidence. I answered, that I had little knowledge of him, but that he might be an honest man, or otherwise, as his interest led him. All continued mute for a little space, and I broke the silence by desiring the judge to ask Collison in what language I held that discourse with Oia Sennerat, which the judge did, and was answered, that he did not well know, but that he believed it was in the Industan language. I begged the judge to ask him if he understood that language, and he did so. Collison, after some pause, answered, "No". Then the judge asked him angrily, and with an air of disdain, how he could come in as evidence of words spoken in a language that he did not understand, and he simply said, that *he thought* I had said so; at which the whole crowd gave an huzza, and clapped their hands, and seemed joyful. The judge reprimanded Oia Sennerat for putting him and the Court to so much trouble, and complimented me on my safe delivery, and so departed seemingly well satisfied. . . .

When the judge came, some executioners had followed him with their instruments of death, to put the sentence in execution as soon as the judge pronounces it. Our debates held so long, that it was near eight at night before we got home. Had I been cast in my process, my head had been a sacrifice to my adversary's resentment, and my ship and cargo to the much-injured King, and, to sum up all, my ship's company had been the King's slaves. On my returning home victorious, I had the congratulations of all my friends, particularly the Chinese merchants, whose lives and estates might have been endangered by the like villainous informations.

71. Justice Among the Fur-Hunters of the Arctic Circle.<sup>1</sup>*Murder Punished by Burning Alive.*

[The narrator, one of the most remarkable travel-adventurers of modern times, was born in Czechoslovakia, left home at the age of 20, tramped over Europe as a locksmith for four years, sailed before the mast on the Atlantic, the Indian, and the Pacific Oceans, and in 1893 worked on the trans-Siberian railway. At Irkutsk the idea came to him to cross Siberia northwards on foot to the shores of the Arctic. After passing successfully through an extraordinary variety of hardships and dangers, he settled down as a fur-hunter amidst the Polar Eskimos. Here he continued till 1924, when another series of events took him back to his home-town in Czechoslovakia, where he settled for a while to compose the story of his adventurous life; in 1929 finally returning to the Arctic shores.]

There is true liberty up North. Nobody is limited in his freedom; the banner of the sons of the Golden North is the banner of the freest men on earth. Whatever you see you can go after; everything is yours, there is nothing to stop you. . . . But there can be no doubt that the various advantages due to the fact that the North came under nobody's jurisdiction were counter-balanced by disadvantages. Because, in spite of everything, some people who wandered into the northern regions were not concerned with hunting, which they regarded as too much trouble to themselves and not at all a comfortable way of getting rich. They set about making money by other methods, and in this they did not stick at crime. What helped them best for this purpose was the brandy, which they distilled in such a way that it did not cost them much, but produced a quick and potent effect on anyone who drank it. . . . These dealers in liquor, who came up North and whom we call "blind tigers," would offer an Eskimo brandy, for which he would give furs in return, and when he had got drunk, the blind tiger would rob him of everything and then clear off. The Eskimo was not merely drunk, but thoroughly poisoned. He

1. From *Jan Welzl*, translated by *Paul Selver*, "Thirty Years in the Golden North," New York, Macmillan Co., 1932, p. 305, by permission of the publishers.

had a swollen stomach, he rushed about, sometimes foaming at the mouth, and if he managed to get hold of an axe or a knife, he would rush about like a madman and murder anyone who crossed his path. . . .

In such cases of rascality we first of all tried to tie up the men who had been poisoned; we gave them water or soda-water, if there was any at hand, then we gave them milk, and as soon as the man came round, we at once tried to find out who had been with him, who had sold him the brandy, what the man looked like, and how much he had stolen from him. Meanwhile all the Eskimos and Polar settlers were making inquiries in every direction whether any strangers had been seen knocking about, and where they had gone to. . . . Often the blind tigers had driven away, and their track was lost at a spot where the tracks of various sledges crossed, or else a blizzard had completely swept away their tracks. Then a jury met, twelve men elected for the purpose of avenging the crime. They discussed what was to be done next. Dogs trained as trackers were taken to try and see whether anything could be discovered with their help. It often happened that we reached a place where people were camped who knew nothing whatever about the crime. If they were in a cave, we called upon them to come out unarmed and with their hands up. They had no reason to be afraid, so they obeyed our orders and came out. We then cross-questioned them closely, and, if we discovered nothing else, we at least found out in which direction the blind tigers had gone. Often, these people would willingly help us in the pursuit. As a matter of fact, every honest person living up North is under compulsion to help in such a man-hunt, either by giving information or by joining in.

So on we raged, and often we discovered the bandits peacefully camped in a cave of snow or ice which they had quickly constructed. They imagined that they were absolutely safe. We called upon them to come out of the cave. When there was no reply, which generally happened in such cases, we sent dogs into the cave. Sometimes the animals succeeded in hounding the bandits out, but often they did not. So, for the last time, we called upon them to come out. Nobody came. Before very long, without making any

bones about it, we inserted a charge of nitro-glycerine or dynamite in the hole and in a few seconds a lump of snow-covered rock was flying in all directions. It splits up into pieces, and sometimes bits of human bodies fly up too. But this time those who are not dead will certainly crawl out with their hands up as a sign that they have surrendered, and let us pinion them. . . .

About six weeks after the affair of the tinned goods, I was standing in front of my cave. It was still during the period of Polar twilight, a vast area of icy sea still lay dimly under the bare rocky cliffs, in whose snowy and icy surface the Polar blizzards had worn away many deep furrows. . . . Suddenly I saw a large crowd of people on the shore, pushing their way towards the path which led up to my cave, and which I had taken so much trouble to cut through the rock; and I realized that they were coming to see me. They were walking along slowly with a solemn air, and from a long way off they shouted to me and waved their hands. . . . At the head of them was MacDonald, and Emerson, MacIvor, Captain Yankee, twenty other Polar settlers, behind them Captain Aak-Mook and Yak-Sook-Ojaak with their Eskimo friends, all the men from the Eskimo reservation. I stood there calmly looking at them. Now they had reached the top. MacDonald greeted me: . . . "Silence, boys! Arctic Bismarck, you have been elected chief of New Siberia!" . . .

One after the other came up and shook hands with me, those good fellows, who, for so many years, had worked, suffered, and struggled with me. . . . They talked me over, saying that in most cases trials had to be held during the trips at which I was nearly always present, so I should accept this great honour and they would find no better man there for it. . . . And so I became the chief and the supreme judge of New Siberia.

Since then I have been in charge of man-hunts, I have been in charge of the jury according to the law of the Indians, I have condemned men to death, or I have set them free; in fact, I have been what we call "supreme judge of Indian justice."

We conducted our trials according to the old Indian system of justice. As we have no prisons, it is easy to understand that

the only penalty we have is the death penalty. When a man is found guilty, he is put to death. If his guilt is not sufficient to justify so severe a punishment, he is acquitted. In places where there is a sheriff or a marshal, as such officers are generally called beyond the Polar Circle in Alaska and Canada, they act as judges; but if someone resists their authority or escapes, the sheriff resigns his office as far as this particular case is concerned, and hands it over to a jury constituted according to the law of the Indians.

The jury consists of twelve men. As a rule, more than half of them are white. One of these twelve is the head jurymen, and a thirteenth man, the elected head of the jury, and the supreme judge of the district, are in charge of the proceedings. In addition to these thirteen, there are two prosecutors, who at the same time are witnesses of the whole trial and sign the minutes. In extreme cases the jury can carry on a trial without these two witnesses, if it needs them to make up the twelve.

The duty of the jury is to catch the culprit, to try him and carry out the sentence.

When the culprit is caught, the trial begins. In the northern areas and in Arctic waters this trial takes place in the spot where the culprit was caught, that is, most frequently, out in the fields, wildernesses of ice or snow, and always in the open air. As soon as the culprit has been tied up, the head jurymen and his eleven associates withdraw and each of them receives a black mask. What it really consists of is a weird garment reaching below the knees and with a death's head above. It fits tight round the top of the head, is not pointed, and there are holes in it only for the eyes. Now the twelve men arrive and stand in a weird and solemn row close by the prisoner. It is a terrifying sight in itself when these judges in black take up their positions on a white icefield or in the snow.

The two prosecutors then come forward and announce that they identify the man who is being tried. He has committed such and such a crime. All remain silent. The prosecutors also mention whether the accused was the leader of the bandits or only one of the rank and file, and so forth.

Then the supreme judge turns to the accused and says: "What is your name?"

Some of the prisoners give their real name, some a false one, many retort: "You've got me, I know what is in store for me. I won't tell you anything."

The judge stands up and writes down the answer. "Where were you born? What is your nationality?" If the man does not answer, they judge more or less by his appearance what nationality he is likely to be, and it is recorded in the minutes.

Sometimes it happens that a man declares himself innocent, pleads and does all he can to prevent the sentence being passed on him. The supreme judge, when it seems to him that the case is uncertain, has the right of stopping the proceedings or declaring them to be terminated, and he can liberate the prisoner without having to give his reasons why. If he think fit, he can leave the decision to the jury. He does not ask the accused whether he is guilty or whether he has any excuse to make. These are matters which form no part of Indian justice. All that is done is to ascertain the man's particulars.

The jury immediately withdraws and discusses the case. There is no need to explain anything to them, they were present at the capture of the culprit, who has been apprehended partly as a result of the description, which the victims or their relatives have given, and to no less an extent because of what was found in his possession. Even if, for example, he had no brandy on him, his belongings in the sledge may have smelt of it, or he was caught with fire-arms in his possession, he refused to come out of the cave,—and various other such circumstances are known to the jury from what they themselves observe, and this leaves no room for doubt, because an innocent man will always behave differently from one who has some crime on his conscience. Finally the head of the jury turns to the prisoner and asks: "Have you any special wishes? Do you want someone to be informed about your death, or are we to send a message to anyone?"

The general answer is: "I've got to die anyway, so what does it matter?" Often the condemned men give very cantankerous and abusive answers.

Then an exact record of the man's appearance is entered in the minutes, and now the head jurymen, if the jury are not clear as to the point at issue, can ask further questions. He can inquire what sort of brandy it was, how many people died; the man in charge writes it all down. The answers are given by the one who knows about it.

The jury then get together and hold a brief discussion. The chief jurymen announces that the jury have condemned the accused to death. According to the seriousness of his guilt, the jury sentence him either to the lightest punishment, that is, hanging. A more serious punishment is shooting, and the most serious is burning alive. When there are many Eskimos on the juries, they give numbers to these punishments, to save the Eskimos the trouble of thinking a lot. One means moderate punishment, two, more serious, three, the most serious. That is because it is cold on the ice, the jury ought not to stop there longer than five minutes, and these numbers make it easier.

It would seem that punishment by hanging is a disgraceful one. A man who is condemned to be hanged nearly always, according to an old custom, can count on the mercy of the supreme judge, the penalty being that he is permitted to choose some form of suicide. He can shoot himself, poison himself, or stab himself with a poisoned knife. All the paraphernalia for this purpose is placed on a sledge in front of him. A revolver, a bottle of strychnine, a knife which has been dipped in poison. . . .

These are the regular trials according to the law of the Indians.

But it sometimes happens when the bandits are being hunted down that twelve reliable men cannot be got together, and so the jury cannot meet. There need not be any prosecutors, there need not even be a supreme judge, but there should be twelve jurymen. But there can be no loitering about on the ice or in the intense cold. The prisoner must either be set free or executed, and so the men,

whether there are five or only two, discuss what is to be done with him. Often the jury have assembled and the trial can take place, but they are afraid that there may be many more bandits in the neighborhood, who might come up unawares, set their companions free and then simply burn alive the jury with the judge and prosecutors. In such a case as this, the trial lasts hardly half a minute, the men just say the word and it is all up with the prisoner. He is either burning on his sledge or shot or hanged.

This kind of rapid trial is also held when a bandit has fired at his pursuers. As soon as he is caught, they execute him without wasting any more time. In the minutes it is placed on record that he was killed while running away, or that he offered resistance. A description of his appearance is given, a cross is added in the proper column, and that is the end of it.

## 72. Justice in the Mountain Fastnesses of Szechwan.<sup>1</sup>

### *A Ruthless Method of Extracting the Truth.*

[This traveler, an English mining engineer, was making his way out of Southwest China through Burma, and was hospitably entertained by one of the Chinese Governors (Tootza), who in this distant region, was virtually a dictator, and had his own brand of justice.]

The Tootza's castle, as we approached, looked like a mediaeval castellated fortress, high up in the mountain fastness, at an altitude of 9,900 feet; but we were astonished, on closer inspection from inside, to find the castellated battlements surrounding the yamen were a pure deception, consisting of merely latticed framework made from split bamboo plastered with mud and painted on the outside to resemble stone. . . .

We formed in procession before entering the castle, and were received by the Tootza, in royal robes, with much ceremony, as the

1. From *Herbert W. L. Way*, "Round the World for Gold", Sampson Low, Marston, & Co., London, 1912, p. 258.

first foreigners to set foot in Kwa Pit. The ceremony over, we found him a jolly good fellow. He implored us to stay several days. . . .

The Tootza invited us to witness a murder trial on the second evening of our stay. The court-room was a veritable torture-chamber, various fiendish instruments being used for extracting evidence. The most diabolical of these instruments was one in which the legs were locked in two pairs of stocks, one above the knee, and one at the ankle. Above the place where the shins would come was a heavy sharp-edged piece of timber, fitted into a framework on each side. This, when the instrument was in use, was driven down with wedges, tighter and tighter, until eventually the legs were broken unless the required evidence were given before this point had been reached.

However, nothing worse was used upon this occasion than the bamboo, upon a young witness who was presumed to be prevaricating because his evidence did not agree with that of a preceding witness. He was sentenced to two hundred strokes with the bamboo, and this sentence was carried out by six men in the centre of the court. The youth was stretched out, face downwards, on the floor, and a man sat on each arm and leg, the other two men kneeling, one on each side of him, holding in each hand a strip of bamboo, resembling a foot rule, but a little longer. This held lightly, between the finger and thumb, and was brought down, whack, whack, whack, with no force, but always in the same place. The application of the bamboo brought up four nasty blood-red weals in a very short time; but it was stopped the moment the witness expressed a desire to give the correct evidence.

Except for this incident the trial was conducted in a very just and fair manner, and the Tootza certainly did his best to get at the facts of the case. Eventually he committed the prisoners for trial in the Chinese court at Yen-yuan.

73. Stern Impartial Justice among the Druses of Lebanon.<sup>1</sup>*The Chief Sanctions the Execution of his own Brother.*

[The Druses are a distinct community in Syria, fanatical and warlike, inhabiting the mountainous regions of Lebanon, and separated from the neighboring Arabs and Syrians by their own peculiar religion. Under the mandate system of 1920, when Syria became an independent State under a mandate to France, the "Government of Jebel Druse" (jebel=mountains) with a population of about 50,000, remained apart, under direct French administration.

The narrator, one of the most accomplished travel-adventurers in the Orient and Africa, had exceptional opportunities of being hospitably received by this exclusive people.]

We were traveling in a big open Cadillac, and intended to reach Souieda, the Druse capital, late that afternoon.

Our first glimpse of Souieda, rising miles away beyond the level plain, showed that it was no typical Arab city of any sort which I had previously seen. It was more like a feudal hill-town in Brittany, with its massive gray stone walls, square parapets, and close-clustering houses as solid as if they had been hewn from the living rock. There was never a dome nor a minaret, for the Druses are not Moslem. They are a separate race, held together by a secret religion and by their marriage laws, which inflict swift death on any Druse woman who seeks to marry outside her own people. . . . Like all Arabia, the Djebel Druse was theoretically under the domination of the Ottoman Empire for centuries, and since the establishment of the French mandate in Syria, the Druses have been theoretically under the domination of France. But they have never accepted either, in fact, and their history has been one long series of revolts and wars. . . .

Two days later we were pushing farther back into the Djebel, to visit another great Druse war-chief of the same family, Hussein

1. From *W. B. Seabrook*, "Adventures in Arabia: Among the Bedouins, Druses, Whirling Dervishes, and Yezidee Devil Worshipers", New York, Harcourt, Brace & Co., 1927, p. 170; by permission of the publishers.

Pasha Atrash, lord of Anz. We had to abandon the Cadillac and take to camels. Anz, which we reached just before twilight, was a huge rambling castle-fortress on a hillside, with some hundreds of flat-roofed, thick-walled stone houses massed close beneath it, on the slope. Servants met us at a gateway in the castle wall, and followed us, leading our camels, into the courtyard with its stables and granaries.

A steep, straight, narrow flight of steps led upward for more than a hundred feet to a colonnaded terrace, which overlooked the valley. From the terrace, we entered the main reception hall, high-ceilinged, richly rugged and tapestried in Oriental style, but with velvet-upholstered, gilded furniture of European design brought on the backs of camels from Damascus. . . . A moment after our arrival in the reception hall, Hussein Pasha entered. He bowed profoundly, repeating to each of us: "Welcome, my house is honored." He was a thick-set man of middle age, with a face of great strength. He wore the head-dress of an Arab prince, white silk *kafieh* [cap] held in place by a double gold band, and a black *abba* [coat] embroidered with gold and silver. . . .

One afternoon Hussein Pasha took me to Liheh to attend a village court where the old Druse justice was being administered. It was in the *mukhaad* [mansion] of the chief elder, who was to act as judge. Other of the sheiks and elders sat with him. The complainant, a Christian farmer from the Hauran, stood before them, bewailing the fact that he had been robbed of four camel-loads of grain in this same village the night before. He was permitted to introduce Druse witnesses to support his statements. After a conference, the chief elder rendered judgment: "Even though it may not have been a Druse who robbed you; even though a Bedouin or other stranger may have been the guilty one, the shame and responsibility are upon us, since in the village you were our guest. From the village common stores an equal amount of grain will be immediately returned to you, and we ask you now formally to accept our apologies."

Afterward, apparently as a minor detail, the elders set about trying to find the thief.

I asked Hussein Pasha what punishments were ultimately inflicted on offenders. He said: "In Souieda there are jails under the French law, but we have no jails or prisons here. If the offender is a stranger, he is fined and never permitted to come into the Djebel Druse again. If he is a Druse, he is likewise fined. If his fault is forgivable, he is forgiven. If it involves dishonor, then permanent disgrace and shame are his greatest punishment."

I said to him: "But surely there are crimes for which no disgrace is sufficient punishment?"

He replied: "For that, of course, there is death." And on the way home he told me this story:

"We Druses are no good at trades," he said. "Most of us know only how to fight. We usually get masons from the Lebanon to build our houses. A few years ago, a Christian stone-mason from Showair came to the village of Sheik Amir to build a new house for one of the rich men. He brought with him his pretty young wife, a Christian woman, who went, in the Christian way, unveiled. When the house was half finished, the youngest brother of Sheik Amir went one day to the mason's house and took his wife by force.

"She immediately told her husband, and he, in fear, gathered all his belongings together, put them on a couple of donkeys, and went away with his wife in the night. The next morning the man whose house he was building followed him on horseback and asked him angrily why he had left the contract unfinished. The Christian replied: 'My honor is already gone, and if I tell you why, my life will be gone, too. The man who wronged me is a Druse whom even the Druses fear. What could I, a Christian, do against him?' The employer then forced the Christian to tell him what had happened and to go back with him to the village.

"He went straight to Sheik Amir and said: 'You and I and our village have lost our honor, and it can only be regained by the shedding of blood.' There followed a great gathering of the elders and warriors. The guilty brother himself came, fully armed like the others. While the warriors stood in a great circle with their horses, the forty or more sheiks and elders sat in a smaller circle and

were served with coffee by the servants of Sheik Amir, who was the host, because the conference was on the outskirts of his village.

"Then the rich Druse whose half-built house had been abandoned arose and said: 'O Sheik Amir! suppose that you were a poor man, and, with your wife, went to work in a town among strangers; and suppose that, while you were working, a man of the town entered your dwelling place and took your wife by force!'

"Sheik Amir leaped to his feet and drew his sword to kill the speaker—not because he dreamed that the affair concerned his own brother, but because he was outraged by the reference to his wife in a connection so horrible. The other sheiks, however, leaped upon him and held him, perceiving some secret meaning in the words.

"'O Sheik Amir!' he continued, 'kill me later if you wish, but now answer me this question: If such a tragedy occurred, what punishment should the guilty man receive?'

"Sheik Amir replied, 'He should surely die.'

"'Suppose a Druse had done a thing like that?'

"'If he were my own son, he should die.'

"'Do you stand by that judgment?'

"'I repeat, if the man were my own flesh and blood, still he should die.'

"'Is that the judgment of all?' shouted the speaker.

"'It is our judgment,' replied the sheiks.

"The Christian was brought in, too much frightened to speak. His employer, after telling the story for him, said: 'I command you to point out the man.' Tremblingly he did so.

"The truth was plain. According to custom, if a Druse does something that merits death, his own family exacts the penalty. So Sheik Amir slew his own brother there, and thus the justice was accomplished."

An hour later the man who had told me this bloody tale of savage justice was seated in his orchard-garden with children on his knees and tugging at his *abba*.

74. Settlement of a Blood-Feud among the Afghans.<sup>1</sup>*The Sister acts as Avenger.*

There are two words which are always on an Afghan's tongue—*izzat* and *sharm*. They denote the idea of honour viewed in its positive and negative aspects; but what that honour consists in, even an Afghan would be puzzled to tell you. Sometimes he will consider that he has vindicated his honour by a murder perpetrated with the foulest treachery; at other times it receives an indelible stain if at some public function he is given a seat below some rival chief.

The vendetta, or blood-feud, has eaten into the very core of Afghan life, and the nation can never become healthily progressive till public opinion on the question of revenge alters. At present some of the best and noblest families in Afghanistan are on the verge of extermination through this wretched system. Even the women are not exempt.

In 1905, at Bannu, there was a case where a man had been foully murdered over some disputed land. It was generally known who the murderer was; but as he and his relations were powerful and likely to stick at nothing, and the murdered man had no near relation except one sister, no one was willing to risk his own skin in giving evidence, so when the case came up in court the Judge was powerless to convict. "Am I to have no justice at the hands of the *Sarkar* [government]?" passionately cried the sister in her despair. "Bring me witnesses, and I will convict," was all the Judge could reply. "Very well; I must find my own way," and the girl left the court, to take no rest till her brother's blood, which was crying to her from the ground, should be avenged.

Shortly after this, I was sitting in a classroom of the mission school teaching the boys. It was a Friday morning, when thousands of the hillmen come in to the weekly fair, and the bazaars are full of a shouting, jostling throng, the murmur of which reaches even the schoolroom. Suddenly a shot was heard, and then a con-

<sup>1</sup> From T. L. Pennell, "Among the Wild Tribes of the Afghan Frontier", London, Seeley & Co., 1909, pp. 17, 28.

fused shouting. Running out on to the street hard by, I found a Wazir, quite dead, shot through the heart. It was the murderer. He had escaped the justice of the law, but not the hand of the avenger, for the sister had concealed a revolver on her person, and coming up to her enemy in the crowded bazaar, had shot him pointblank. She was arrested there and then, and the Court condemned her to penal servitude for life.

I met her some weeks later as she was on the march with some other prisoners to their destination in the Andaman Islands. Resignation and satisfaction were her dominant feelings. "I have avenged my brother; for the rest, it is God's will: I am content." Those were the words in which she answered my inquiries.

. . . . .

On one occasion I was seated with some Afghans in a house in the village of Peiwar in the Kurram Valley. . . . . One side of the street was in one faction and the other side in the other faction, and they were always in ambush to fire at each other across the street. . . . . My host went on to show me sundry holes in his door and in the wooden panels of the windows, which the bullets of his neighbours across the street had penetrated, and said: "It was behind that hole in the door that my uncle was shot; that hole in the window was made by the bullet which killed my brother." Pointing to another Afghan who had come into the room and seated himself on the bed, he said: "That is the man who shot my brother." On my remarking upon the peace and goodwill in which they appeared to be living at the present time, he said: "Yes, we are good friends now, because the debt is even on both sides. I have killed the same number in his family." After a faction fight of this kind, the fatalities on both sides are added up, and if they can be found to be equal, both sides feel that they can make peace without sacrificing their *izzat* (honour), and amicable relations are resumed, it being thought unnecessary to investigate who were the real instigators or murderers. If, however, one side or the other believe itself to be still aggrieved, or not to have exacted the full tale of lives required by the law of revenge, then the feud may go on indefinitely, until whole families may become nearly exterminated.



75. Cruel Justice of the Ameer of Afghanistan.<sup>1</sup>

*The Ameer eats his Ice Cream while 400 Rebels have their Eyes Put Out.*

[The narrator, a lawyer of New York, is describing a journey made alone, about 1930, into Afghan, via Persia, seeking an audience with the new Ameer of Afghanistan, Nadir Kahn,—the one who succeeded the reformer Amanullah Khan, after expelling the bandit usurper Bacha Saquo.

At the time of narration the author, still in Persia, is seated in Teheran at the Club, conversing with a British ex-major:]

At our table we talked of Afghanistan and my journey of the morrow. "You'll find cruelty there—the cruelty of a strong people consistently fighting to hold onto their ancient ways. It's a different existence than this hybrid life breeds. Nothing like that," my host said, as he nodded toward a table where an old Persian doctor sat with his French wife. . . .

"A friend of mine once talked with Abdur Rahman, who ruled Afghanistan forty years ago. He always recalled the startling characterization His Highness gave his own subjects. Amir Abdur Rahman was eating ice cream on the terrace of the Kandahar Palace. He was chatting with my friend, an engineer, outlining plans for subduing belligerent tribal chieftains and hammering together a stronger realm. Four hundred rebel troops were marched into the courtyard. Their tall bodies swayed in rough, pointed-toed shoes. The ends of their bulbous turbans fluttered in the hot wind.

"The Amir paused in his eating, whipped a fleck of foamy cream from his grizzled black beard, removed another splatter from the golden medallion on his blue military blouse. He turned to the officer in charge of the rebellious troops.

" 'Put out their eyes,' he ordered.

"The court blinder (called 'doctor' in the presence of squeamish Europeans) went skillfully to his task.

1. From *Ben James*, "The Secret Kingdom, an Afghan Journey," New York, Reynal & Hitchcock, 1934, p. 55; by permission of the publishers.

"The Amir resumed his eating. As he stirred the last of the melting ice, his voice, mingling with the yells of pain from the blinded men below, cried, 'You say I am an iron ruler? I rule an iron people.'"

76. Reforming Old Trial Methods in Old Korea.<sup>1</sup>

*Witnesses willingly endure a Beating.*

[The narrator went out to Japan in the early '90s, as secretary of legation. In 1897 he was appointed secretary of legation at Seoul, the capital of Korea, and afterwards was invited by the Emperor of Korea to enter his service as personal adviser. Korea was at that period a center of international intrigue by the competing powers, each of which desired to prevent Korea's weak government from being dominated by any of the others. The Korean Emperor sought to strengthen his own position by introducing Western reforms, and he relied upon the narrator to assist him in this purpose.]

In 1899 I was invited to become adviser to the Emperor, and to initiate him into the mysteries of European politics in their bearing on himself. . . . I was enormously flattered, and at the very competent age of twenty-five, I felt capable of pulling the grand khan himself out of any amount of trouble, and I liked the Koreans. Our minister, Dr. Horace Allen, approved, for he felt that if anything could be done for the salvation of the Koreans, only Americans could do it. . . .

I had a program, and I had a party at court. Our objective was the neutralization of Korea in the event of conflict between Japan and Russia, in which America's interest, while probably vague, would still be a real asset. In order to secure favorable attention for neutralization and absolute peace treaties between Korea and all the world, it was primarily necessary to work on two things: improvement in administration, and education . . . Provincial administration was often rotten in that respect, and in places it

1. From *William Franklin Sands*, "Undiplomatic Memories", New York, Whittlesey House, McGraw-Hill Book Co., 1930, p. 116.

was frightful, for torture still existed ordinarily in the remoter back country, and was even revived occasionally in police procedure in the capital.

I knew all that, but I also knew that I had some influence with the Emperor; he listened to me with confidence. I also knew that there was a considerable body of Korean officials who would prefer to be honest and were as decent as the system let them be. . . . I was given a house near the legation quarters and rooms inside the palace, with a staff of interpreters. . . . All imperial business, such as ministers' daily reports, policy to be made, meetings of the great council, were interspersed with, and more often than not superseded by, His Majesty's *menus plaisirs*. It was Alexandre Dumas in oriental setting.

I was expected to be on duty from sundown to sunrise, ready at any time for an audience or to answer a question or give advice on some report. Sooner or later all official business came my way.

One of the constant visitors to my rooms on these occasions was a venerable old gentleman with a long silky white beard, who had held an office, years before, corresponding more or less to a combination of commissioner of police, State prosecutor and trial judge all in one. . . . He never omitted to thank Heaven that torture had been abolished, at least officially, by foreign influence.

Torture had been abolished by law, it is true, but it was too deeply part of native custom to root out easily. The practice is so widespread in the Far East that the French were obliged to admit it into their colonial legal code, though in a mild form, to be sure. They found out that, in their war on river pirates, they could not find witnesses and could not expect to, for it was certain death for a villager to tell on his neighbor. Confession by a witness under torture was admitted, however, in village custom. If a witness returning from court could show marks of torture on his body, he was safe. The French, there, paddled every witness thoroughly in a piracy case, with the full consent of the paddled, before ever a question was asked of him. They beat him with an instrument rather like a canoe paddle or a thin cricket bat, on a part where he

could not be injured, but where bruises would show up beautifully. After that he could tell the truth, if he was capable of that, without fear of death from his fellow villagers. The bruises had to show, though, when he got home.

Koreans practiced that minor form of torture also, sometimes on witnesses and sometimes as a punishment for light offenses. . . . Those practices we did not have, and whether the Chinese needed to be ruled that way or not, Koreans did not need to be, for our people were peaceful and harmless unless driven to desperation by abuse. There never were people more easily governed. I was determined to stamp out those tortures that still existed. . . .

Returning from one of my expeditions into the country I learned that word had come up from the island of Quelpaert of what seemed a formidable rebellion. . . . The sequel to the war was the trial of the rebel leaders at Seoul. I wished it to be an exemplary trial. It should be the first illustration of the new order of justice in Korea. Beyond presenting a report to the Emperor of the reasons of the revolt, what had happened, and the circumstances under which the accused were presented for trial, I intended to have no part in it, except to sit as an observer with the Korean judges and to see to it that the men had a proper defense and that witnesses were admitted in their favor as well as against them.

I was disappointed in the efficiency of our new model of justice. Seeing that I did not intend to try them myself, and would not testify (though I knew their cases) so as to give them every possible chance, accused and witnesses looked me blandly in the eye and lied brazenly. Finally the Chief Justice turned to me and said that though he hated to disrupt the course of Western justice, he felt that an ever so slight return to primitive methods might give better results, and asked if he might threaten to use the paddle. It seemed to me that if he threatened it might show the prisoners that they had better not force the issue, and I consented to his ordering the paddles brought out, if he promised to accept defeat if they called his bluff, in which case I would agree to testify. The court servants

brought out a kind of sawbuck over which the victim was to be held while being spanked, and the paddles. The effect was instantaneous. They all clamored to be readmitted to examination, as they had remembered something! The instruments were removed and the trial finished in an orderly manner.

But it was the last trial on the Western model, as well as the first.

## 77. Trial of a Suspect in War-Time in Outer Mongolia.<sup>1</sup>

### *A Russo-Chinese Tribunal condemns a German Engineer.*

[The narrator, of German stock but brought up in Russia before the Revolution of 1918, finds himself finally in China, an experienced aeronautical engineer, engaged to act as pioneer in locating airports on the Mongolian borders. The period—1932 and later—was one of Soviet penetration, and of their final domination over the Chinese authorities. Rival predatory military forces were everywhere to be encountered. He is arrested by the Russian military as a spy, is cast unceremoniously into one filthy prison after another, and finally is taken to Urumchi, the capital city of Outer Mongolia, for trial before a Russo-Chinese military tribunal:]

It was just noon on January 10th, 1935, when I was pushed roughly over the threshold of a large, gloomy room at the headquarters of the "Bau-An-Du" (the G.P.U.). On my right was Dorn, the German, and on my left was a Russian fellow-prisoner, who was charged with high treason. Half an hour previously we had been escorted in General P——'s black Citroen car from our cells along the streets by a heavily-armed guard. The Russian, a fair-haired and blue-eyed man of massive build, had whispered anxiously in my ear that we were going on our last journey. The black limousine in which we were being escorted was ominously like the "death car" in which condemned men were driven to the place of execution in Holy Russia.

1. From *Georg Vassel, "My Russian Jailers in China"*, transl. *Gerald Griffin*; London, Hurst & Blackett, 1937, p. 263.

And just at that moment we realised that something very serious was afoot. The two horsed carriage of the Consul-General of Urumchi was standing in front of the G.P.U. building, showing that either the Soviet Consul Apressov, or the Vice-Consul Kanin, was present.

We stood there passively awaiting our doom. I glanced at Dorn, whose face was twitching nervously as he took in all the details of our strange tribunal—the long table, around which ten people were seated, chatting in the most casual manner, while they drank tea out of thermos flasks, chewed melon seeds, and ate the Russian tea-cakes and apples lying on dishes in front of them. To their right sat an amanuensis at a small table. Through the half-open door of an adjoining room the Soviet officials attached to the consulate could see the entire proceedings without being observed themselves.

"The accused are to be seated!" Thus rang out the order issued by Chan-I-Wu, the Chinese general, which was then translated into Russian by an interpreter.

We looked at one another, shrugged our shoulders, and helped ourselves to the ripe red fruit.

The president then introduced himself and the other members of the Court, to wit, the judge-advocate, Fen, and two Chinese judges. . . . General P—— opened the proceedings by stating that we had been imprisoned by order of the Nanking Government. The interpreter, who did not seem quite sure of his ground, began to hesitate and stammer in his effort to translate this palpable lie. . . . The position was momentarily becoming more and more comical. We laughed wholeheartedly at the turn things had taken, despite the freezing glance which General P—— shot at us.

Eventually he informed us, in a rather embarrassed and irritable tone, that we were about to be put on trial.

"Have you quite understood everything that has been said?" he then went on, addressing himself to me. "Everything!" I replied sarcastically.

There was an interval of half an hour which we spent in an overheated waiting-room, which had several doors—obviously for the convenience of eavesdroppers. We took care, however, not to open our lips.

"Mister Vasel!"

A court official called out my name, and with an armed guard on either side, I crossed the court-yard again, and faced my judges. Among them was Andrejev, who avoided looking straight at me, and bent over the documents in front of him. His colleagues were more casual in their demeanour, and chewed melon-seeds, and spat out the kernels on the untiled floor.

An elegant-looking, pale-faced man arose, and addressed me in a frigid and monotonous voice:

"You are arraigned on four points:

"Point One—destruction of the wireless station.

"Point Two—suspicion of trying to escape.

"Point Three—bribing a prison official.

"Point Four—Fascist propaganda."

He looked at me challengingly, awaiting a reply.

"Now, that's very interesting!" I said. "Very interesting indeed! During the whole course of my previous cross-examination I never heard a word about those four points."

"Have you destroyed the radio station or not?"

"You know yourself well enough that the station could not be used, because parts of it were missing. This fact has also been confirmed in my hearing by a Soviet expert, who gave his opinion on the matter after due investigation."

I glanced at P——, who knew that what I said was true, but he looked away.

One of the two Chinese judges, who wanted to pose as an expert, here interposed:

"Why did you put such a powerful stream of electricity on the wires that you fused the station?"

"Have you the faintest knowledge of wireless telegraphy?" I asked sarcastically.

"I'm afraid I have not," he stammered awkwardly.

"Very well! Then you have no right to talk about it! Now please, let us come to point two!"

"You are charged with making an attempt to escape," went on the President, "we have witnesses to prove it. We can call on them to give evidence. Have you anything to say in defence of yourself?"

"It is a lie—as I will prove if you produce the witnesses! Now, let us come to point three!"

"You gave a thousand *liang* to one of the warders here in Urumchi to get him to put you in touch with the Mission."

"If that is so, I must be a magician. How could I give anybody a thousand *liang*, seeing that my very last penny has been taken from me? Even my laundry has not been returned to me. For fully five months you have been allowing me, a European, to run about in rags!"

For some reason inexplicable to an Occidental, my last words provoked a sardonic smile among my judges. My blood boiled as I looked at their sneering, oily faces.

"You are carrying on Fascist propaganda!" went on General P——.

"What do you mean by this, and how can you prove it?"

"We have plenty of proof. We found two copies of a Nazi newspaper in your suit-case. They were full of brazenly outspoken Fascist propaganda in favour of the new State."

I could not help laughing outright.

"If that is your view, you should denounce every German newspaper. Without exception they all recognise only one common ideal and one common political goal. And what's more, all German newspapers are on sale to the public in China, and are therefore available for everybody."

At this point "the president of the anti-imperial committee" butted in with an oily smile:

"Well, then, your relatives have been carrying on Fascist propaganda. There is incriminating evidence even in the letters which you have received."

"Would you mind showing me those letters?"

My prosecutor made no reply, but sat down, whereupon the President wound up this futile and comically baseless enquiry, which was obviously irritating even to himself.

"Have you any further statement to make?" he asked limply. "No!"

The enquiry was over. I was taken back to the ante-room, where in a subdued tone I gave my fellow-prisoners an account of the result of the proceedings. . . .

Half an hour later all three of us were led back to hear our fate. Most of the judges had vanished, and the table was untidily littered with thermos flasks, melon seeds and cigarette stumps.

The President cleared his throat, and tried to look fiercely official as he read the verdict:

"The defendant Vassel is sentenced to four years' imprisonment, and Dorn and the Russian to two years each. The defendants have a right to appeal against this verdict, provided that it is lodged during the course of the next three days. Furthermore, the right to appeal has to be approved by the Urumchi government. Written confirmation of these sentences will be delivered in due course." . . . None of us spoke about the sentences which were destined to cut us off from human society for years. It seemed as though none of us could bear even to think of such a prospect. . . .

While I was brooding over my hopeless outlook, we went through the gloomy prison gate which opened into a narrow archway through which we could only pass in single file. I was just in the middle of this sinister tunnel when I fancied I heard somebody whispering beside me. I halted, under the pretext that I was tying my shoe-lace, and glanced to the left, where I dimly discerned the

outline of a human figure which had wedged itself tightly into a niche. And once more I heard the same *sotto voce* tones—it was obviously a disguised voice—and a strange blend of Chinese and Russian patois greeted my ear. I could glean, however, that both the trial and our sentences were just a badly-staged farce, preparatory to our formal expulsion from the country. . . .

We spent the next few days in a community cell in the fore-court, sandwiched among Russian, Chinese and Sartian prisoners—the so-called "Labour Detachment." . . . But despite all the misery to which we were unjustly subjected, we felt optimistic. For the first time after the lapse of many months a ray of hope had illumined the path before us!

On January 14th, 1935, the President of the Judicial Commission informed us that our sentence had been commuted to "deportation" by the government authorities in Urumchi.

#### 78. Some Episodes of Consular Extra-territorial Justice in the Orient, A.D. 1898.<sup>1</sup>

[The narrator went out to Japan in the early '90s as secretary of legation, and in 1897 he became secretary of legation in Korea, and later was taken into the Korean Emperor's service as personal adviser (see No. 76, in this Chap. 16). He thus had ample opportunity to observe the workings of the system, then obtaining, by which each foreign consul had the so-called extra-territorial powers of justice over his own nationals.]

An important part of the consular and diplomatic duty of our mission at Seoul was to try high crime and misdemeanor of Americans when we noticed it. There was not often occasion, however, to look up the rules about it in a colony composed of missionaries and business men. . . . All foreign consuls were prompt to claim the person of any of their nationals who got into trouble with the native authorities, but few ever made any effort to extend their authority to the *prevention* of acts by their nationals leading

1. From *William Franklin Sands*, "Undiplomatic Memories", New York, Whittlesey House, McGraw-Hill Book Co., 1930, p. 78.

to trouble. If we ever did, it was sure to be bitterly resented by the American concerned as arbitrary and offensive, on the theory that American officials exist only to pull people out of trouble after they are in, and have no right to interfere to prevent it, or to punish them for causing it. Yet the real object of consular courts was to do both things: to protect the native from foreign aggression as well as to protect one's own nationals from native aggression.

I hear the system much criticized today from lecture platforms by people who do not seem to know very much about how it began, as if it were some violation of the sovereign right of the Asiatic people concerned and an injustice to them of which we ought to be ashamed. But I confess, I cannot see the injustice. I do see that it was then an imperatively necessary thing, no matter how it may be considered now. . . . The simple fact is that the consular and mixed courts were set up as a very necessary way of preventing mutual aggression. Too often no proper power was given to do this adequately, and too often where power was granted, it was misused. . . . The American legation and consulate exercised their judicial functions in a mildly paternal sort of way, like some English squire and justice of the peace, and the convening of an American consular court was an event. Other groups had real and daily use for a much more elaborate and complicated practice, particularly the Japanese, English, and Chinese. . . . Meanwhile our infrequent appearance as judges was more accidental than designed, and often comic rather than imperialistic.

One case which caused some annoyance and discomfort, but more laughter, was that of an elderly and unamiable beachcomber, once a citizen of Massachusetts, who kept a wretched longshore shop of damaged groceries and other refuse in the Chinese slum of Chemulpo. One day his death was reported, and a rumor of death by violence, and, as I happened to be vice- and deputy consul-general in addition to my diplomatic rank, I was sent to Chemulpo to sit as coroner upon him. I had never been a coroner, nor seen one. I had no idea what to do, nor even where to look for the corpse, so I went straight to the center of all information and community

life, the club bar, where I was hailed by the leading citizenry with Rabelaisian laughter and no help.

I had heard somewhere of coroner's juries; I did not know what they were, or how they got to be, but I hoped that my ribald mockers would not know either, and in revenge impaneled every American in the club. To my joy, they knew no more about it than I did, and, trailed by a complete roster of leading citizens cursing me loudly and bitterly but not daring to refuse to go, I found the lair of the unfortunate subject of the inquest. Everything about it was sordid and disgusting, reeking with filth, and the man himself horribly diseased. Hardy pioneers though they all were, my jury tried to stampede; I was inexorable, threatened impossible and fantastic things and brought them back, though I was obliged to retire myself for a moment.

We did examine everything thoroughly and conscientiously, shop and dwelling and body. We corralled an English surgeon, but none of us could find a trace of violence. According to the medical report the dead man's combination of quite evident diseases would be enough to kill any one. Orientals are reticent in matters of death, but we made among the neighbors as complete an investigation as possible of his habits, his acquaintance and his movements on the day and night of his death. The British Consul, in charge of Chinese interests and speaking Chinese fluently, helped us, but with nothing to cause the slightest suspicion of violent death, all of which we duly reported back to Seoul.

Meanwhile, his death having been reported by cable (with the addition of the initial rumor) the Department conveyed to the Legation the urgent request of the senior senator from Massachusetts that the man's "murderers be brought to justice." Senator Lodge was senior senator, and what Senator Lodge wanted any diplomat would make an earnest effort to get for him. Our jury report was not accepted, and I was dispatched once more to Chemulpo to find and arrest the murderer, this time as sheriff.

The only foreigner connected with the dead man was a nondescript seaman, who had given as satisfactory an account of himself as one expected from a discharged sailor in a rather low sea-

port town. He was indicated in my instructions, however, as the obvious person to arrest. I found him cleaning and loading a large revolver, and I explained my mission, requesting him politely to put away his gun and to come along to be tried for murder by our consular court. To my surprise he was quite civil about it. I turned him over to the Consul general, and a constable was engaged to keep him in an empty outhouse pending trial.

The great day came. At a table in the office sat the court, flanked by Clarence Greathouse [the Consul-general], very sleepy, and a missionary, very nervous. All the evidence was produced, including the 'coroner's report. Evidence is curious matter to handle, as every trial lawyer knows. The man was condemned to death for murder, on the same evidence upon which the Chemulpo coroner's jury had decided that there was no possible case against him! Then came the climax. The consular regulations did not extend to the death penalty, as Greathouse woke up long enough to point out.

The Consul-general, however, was a sportsman. Having no public funds for the purpose, he built a small but costly jail out of his own purse, put in it the prisoner and the newly hired constable, and went home to try and straighten out the tangle. Hardly had he sailed before the prisoner walked out and disappeared. But he evidently did not fare as well at liberty as in his snug prison quarters, where the constable cooked for him and talked to him all day; so he returned in a few days. I dismissed the gaoler, put the prisoner on parole (he could not leave the country anyway), let him cook his own meals, and made him gardener and stableman until he was transferred to St. Quentin in California; and on review of the evidence there, he was released! . . .

The treaty ports, or ports opened by treaty to foreign residence within a three-mile radius of the center of the town, were governed by several different bodies. The native magistrate had jurisdiction over all Koreans; generally there would be a Japanese concession and a Chinese quarter, each under the jurisdiction of its Consul, and a general foreign concession under a municipal council composed of all foreign Consuls, with the Korean Magistrate, the local

collector of customs and several leading citizens. Things drifted along very pleasantly under this system. In Chinnampo, a small outport, the French collector of customs was also honorary American, French, Russian, British and German vice consul, besides having his personal vote as elected property owner. As colleagues he had a Japanese and a Chinese Consul and the native magistrate—three votes in all against his seven. He always had not only a quorum but a majority, except in cases where, under explicit instruction, he might be obliged to vote as American vice-consul against himself as Russian, etc.

In Chemulpo things generally ran smoothly. Our whole constabulary consisted of one very old and respectable Chinese night watchman with a huge sleep-dispelling wooden clapper. There was no need for him in the daytime, for nothing ever happened that anybody could do anything about. Foreign residents complained of his noise at night, and so, in solemn session of the municipal council, he was dismissed, and in his place a high-priced "Jimmie Legs" from the navy was engaged, whose enlistment had just expired. At once we had a most modern crime wave, and no house was safe from robbers. Burglaries took place right under the nose of our constable. Chemulpo had always been a peaceful community; residents complained bitterly, and the council met once more to consider the matter. Next to me sat the Chinese Consul, smiling softly and stroking a thin white beard. I asked him what he thought.

"We are not clever, you know, like you Westerners," he answered—"but we think we know the human heart. With us, when a thief goes out to steal he knows that he is sinning, and that Heaven is watching him. If, then, he hears the voice of the wooden clapper approaching, it is as the voice of Heaven to his guilty conscience and he flees the spot. The clapper pursues him everywhere. He feels that at any moment justice will overtake him, for some one is watching, even though it be an old and feeble man. Your new constable, alert, young, strong and well armed, is silent. He does not hear the thief and the thief does not know that he is

near, so the thief becomes bold.—It is not Europeans who are doing these burglaries.”

I voted for the rehabilitation of the ancient one with his wooden clapper—but then, I slept at Seoul, twenty-four miles away. It is true that when we took the Chinese watchman back the crime wave ceased.

Perhaps the Chinese consul was really more clever than the West!

## *Part III. AFRICA*

### *Chapter 17*

## *PRIMITIVE NATIVE TRIBES*



## Chapter 17

79. *A Trial in the Highlands of the Blue Nile.  
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## PRIMITIVE NATIVE TRIBES

[Introductory. Centering our attention upon the Primitive Native Tribes, we thus set aside the ancient Egyptian people; the long christianized Ethiopians; the early conquerors of the northern coasts (Phoenicians, Persians, Greeks, Romans); the later invading Arabs; and the modern immigrant nations of Netherlands, England, Portugal, France, and Germany. With the well-known trial-methods of these last, the present work is not concerned. Ancient Egypt is represented in Chap. 26, Nos. 130-132. The Arab methods in Egypt are illustrated *ante*, Chap. 9, No. 47, and *post* Chap. 18, No. 87; the Ethiopian in Chap. 18, No. 86; the Greek and the Roman in Chaps. 29 and 30.

The varied primitive native tribes of Africa represent somewhat the same stages of arrested development as those of North America (Chap. 19) and Oceania (Chap. 25). Their racial origin is still open to some learned speculation; one authority calls Africa "a vast museum illustrating human life from the most ancient palaeolithic times to the most wonderful achievements of civilization". All of the above-named invading peoples have influenced by mixture many aboriginal tribes during the last two thousand years. But, barring the regions where the invading peoples displaced the aborigines, the native population falls into three grand racial divisions,—Bushmen, Negro (Bantu and Hottentots), and Hamite. Yet even among these, the constant transfers and mixtures by migration and by conquest, make it difficult to describe the population of any particular area by definite typical names.<sup>1</sup> In the eastern Sudan, the peoples are partly Egyptian, partly Hamite; in the

1. The best descriptive summary of the populations of Africa, traced to date through their confusing history from pre-historic times, is found in Sir H. H. Johnston's "The Opening Up of Africa". This writer (1858-1927) was traveler, explorer, consul, governor, in several regions of Africa, originator of the Cape-to-Cairo plan, and author of numerous works on Africa. The above book brings to bear, for his interpretations, not only his wide personal experience, but a unique combined knowledge of the country's history, archeology, geology, anthropology, climate, zoology, botany, and industry.

coastal north, they are largely Arabic and Berber,—the latter being a mixture of Mediterranean and Hamite; in the southern Sudan, and generally south and west of that region, we reach the negro and negroid race-stocks.

The three grand negro and negroid divisions in the extensive southern area are the Bantu, the Hottentot, and the Bushmen. The Bantu (conquered and mixed with Hamites) are mainly in East and South Africa; they include such well-known tribes as the Masai, the Swahili, the Zulu, the Basuto, the Mashona; their complexities may be illustrated by noting that the Zulu include the Kafir, which in turn include the Amaxosa (*post*, No. 81). The Bantu are both pastoral and agricultural in mode of subsistence. The Hottentots are pastoral. The Bushmen are nomad hunters.—In the western part of the above area are negro and negroids mixed with Berber and Hamitic stocks; some of the best known and most advanced tribes are the Hausa and the Ashanti.—In each of these regions there are of course scores of local tribal subdivisions.

The languages are equally numerous and varied. They are generally grouped into four families,—Bushmen, Sudanic, Bantu, and Hamitic. The varieties of structure are innumerable; some have the unique "click"; some have intonations; and every sort of syntactical and grammatical difference is represented. Philologists count some 500 languages in all.

So, too, in their social organization variety is copious. In the southern group, for example, the Bushmen rove in hunting bands with no chiefs; the Hottentots have local clan chiefs, one of whom is nominally the head; the Bantu have settled territories for each tribe, with a powerful chief. Many tribes, such as the Ashanti and the Mashona, had well-developed systems of customary law and justice. In the more primitive tribes, unrestricted blood-revenge was practised; while in others the tribal control had reached an advanced stage of orderly procedure. The ordeal, in a variety of original forms, survived in numerous regions; for religious intervention was firmly credited.

But, in spite of the backward and arrested development of many or most tribes of negro stock, it must be remembered that there

were large areas where a high capacity for political and commercial organization was shown. Large and flourishing cities, such as Kano and Timbuktu, once grew up as inter-regional markets; Jené, on the Niger, is said to be still "one of the wonders of Africa". Industries such as mining and metal-working, pottery and weaving, were pursued, using many invented tools. During the past thousand years powerful military kingdoms arose and declined, one after another, mainly along the coasts of the west, southwest, and southeast,—the kingdoms of the Songhai and the Mandingo, of Sokoto and Benin, of Kongo, Monomotopa, Dahomey, and Ashanti; the kingdom of the Zulu in the 1870s covered a million square miles. But long centuries of the accursed slave trade, fostered by the Arabs on the east and the European nations on the west, and numerous physical scourges of climate and germ disease, were two of the obstacles which tended to paralyze what might have been the continued social development of the native stocks.

The institutions reported by modern observers must therefore be interpreted in the light of this long confused past of varied racial mixtures over the widespread continent. Out of the numerous trial-styles thus developed in various stages of advancement, the following selections will serve as typical of different regions and race-stocks.]

#### 79. A Trial in the Highlands of the Blue Nile.<sup>1</sup>

##### *The Detectives of the Thornbush Corral.*

[Up in the highlands of the Blue Nile, between Ethiopia and the Sudan, are a number of primitive tribes who owed but a nominal submission to the Ethiopian King. The narrator describes an experience with the methods of justice in one of these tribes.]

Native courts are often held under large fig trees. Fig trees, with a spread well over 200 feet, are common. . . . There

1. From *Leo B. Roberts*, "Traveling in the Highlands of Ethiopia", *National Geographic Magazine*, Washington, D. C., September, 1935, Vol. LXVIII, pp. 315-319.

is no lawyer class, and every man considers himself quite able and willing to plead his own case, with the result that odd trials are held.

At first I was concerned at trials over the loud shouting and passionate oratory, the waving of arms and snapping of fingers under the very nose of the judge. It seemed that blood must be shed at any moment. However, when I found that all they were disputing about was whether Gabbre Michael had seen a cooking pan belonging to Gabbre Miriam, I realized that it was a sort of popular sport.

The law, of course, has a more serious side when the offense is grave. At one time I left the main caravan and went alone on a side trip. On my return after a couple of weeks I found that 12 mules had been stolen. The guardians had gone to sleep, and offered many other excuses. I went to see the local ruler and we discussed the matter; my chief loadman suggested an *afarsata*.

This was the first time I had heard of this type of judicial procedure, and as I thought it might be helpful to follow his lead I told the chief that I hoped he would favor me by conducting one. He appeared rather upset about the matter and no *afarsata* was held; however, the suggestion was enough, for the mules were returned that evening!

A few weeks later I had a chance to see just how the *afarsata* works. In this kind of trial, everybody in town where the trouble occurred is shut up within a fence of thorny bushes. No one may go out, even to milk a cow. Once inside this thorny *bomba*, the villagers, all of whom are suspect, wail and moan. They then select eight to ten agents called "birds" who take an oath, the substance of which is, "What I saw and heard, I will not hide."

There is then a weary waiting period, sometimes lasting a month, during which the agents quietly circulate in the crowds and see and listen; and there is little to eat or drink. Finally a "bird" tells the judge the name of the thief. If he is within the enclosure, he is taken off to jail. If he has already made his escape, the whole village is fined. Such is the Ethiopian legal process called *afarsata*.

## 80. A Trial for Theft on the Zambezi River.<sup>1</sup>

### *The Ordeal of Boiling Water.*

We were camped not far from the Kebrabassa Rapids on the Zambesi, waiting for the big open barge in which we would be paddled down stream to Tete. We were a tattered, tired crew, worried over money, as near the end of the tether as I ever hope to be; and it was only the necessity to keep a cheerful face for the sake of eighteen-months-old Joe and little Davy and the natives that kept us going. When we completed our deal with the Indian trader, we would pay off the riff-raff of the country who were our carriers and say good-bye with a sigh of relief to the Ruio-Capoche river district.

When we reached that camp, one of our Barotse boys reported calico missing. That may not sound serious, but it was, desperately, as we paid our boys in calico and were all of one hundred miles from a magistrate. If any boy could prove himself smarter than we and steal from us under those circumstances, we might well lose our last cherished shirts before we got away. But how find the thief? Camp was searched, but in vain. There was not even circumstantial evidence to give us a clue.

Our Barotse solved the problem. Coming together, all seventeen of them, in a solemn delegation they asked permission to try the boiling water test. They used it successfully in Barotseland, they told us, and why couldn't they use it in Portuguese East Africa? Naturally we said Yes. It would be worth seeing if nothing else, for it is one of those customs the white man scorns and which the natives consequently keep to themselves.

The next afternoon the whole lot of sixty-odd natives, with the wives, girl friends and children who were along, were lined up, and our head boy explained the situation. There was a thief, and the boiling water test was to be applied to find him. There was not one dissenting voice. All agreed it was a fair test; so a fire was built and on it settled a huge pot of water. Solemnly we watched it

1. From *Margaret Carson Hubbard*, "African Gamble", New York, G. P. Putnam's Sons, (1937), p. 129.

come to a boil, then boil furiously. A smaller pot of cold water was placed near the boiling pot, and when the water was turning over in huge violent rolls the tests began.

Men, women, little children and big ones stepped forward one by one, each plunged his right arm into the cold water, then into the boiling pot to the elbow, and stepped into line on the other side of the fire. Everyone took the test without a murmur, and when all was finished they were told to return at the same time the next afternoon. The one who, by that time, had lost some skin or showed a blister would be proved the thief.

In single file they returned, every last one of them, passing before us, right arm bare and outstretched for an examination. Out of that small army one man alone showed blisters and peeling skin. No other had any sign of a burn. And he confessed to the crime and returned the calico!

#### 81. Trials in the Amaxosa Tribe of the Kafirs.<sup>1</sup>

##### *Cross-Examination as Practised in Africa.*

It is common to talk of the *despotism* of Kafir chiefs. If by the use of this term it is intended to be implied that the will of the chief is the sole law of the nation, it is incorrect. The government amongst the tribes on this side of the Bashee is not a despotism. . . . The government of the Amaxosa and Abatembu tribes is a sort of mixture of Patriarchism and Feudalism. Age gives great weight and influence to the will of a chief, and most chiefs of rank can generally find means to accomplish their wishes; but if these wishes involve the death or spoliation of any of their subjects, they are usually obliged to resort to some form of law to give colour to their procedure. In the case of a Kafir chief, the principal checks to the despotic inclinations which the possession of power always induces are, first, the division of the tribes, and secondly, the existence of a very influential council. . . .

1. From Col. MacLean, C. B., and Rev. H. H. Dugmore, "A Compendium of Kafir Laws and Customs", Grahamstown, Cape of Good Hope, 1906, p. 35.

It is very common for persons who have exposed themselves to the ire of their own chiefs to take refuge amongst some tribe adjoining; and on doing so, they become so far safe as to be within the protection of a custom which forbids their arbitrary seizure by their own chief, and places them on the same footing (until investigation take place) as the subjects of the chief amongst whose people they have taken refuge. Any attempt to interfere with them by violence, when once they are within the territory of another tribe, would be resented by an instant rising of the clans nearest them in their defence, and that without any enquiry as to the merits of the case. . . .

The existence of a council, in which all matters of importance are discussed at length, is another check upon the power of the chiefs. This council, the members of which are called *Amapakati* (literally "Middle ones"), is composed of commoners, who, by their courage in war, or their skill in debate on public questions, or in unravelling intricate law suits, have acquired great popular influence, and are thus qualified to sustain or control the power of the chiefs. They generally reside in different parts of the country, and have a sort of civil jurisdiction over their respective neighbourhoods. A few of them are mostly to be found at the chief's residence, but on the occurrence of any matter of public importance, the arrival of a message of consequence from the chief of another tribe, or the proposition of any particular measure on the part of their own chief, they are all summoned to the *umzi wakwomkulu*, and no decision is come to till the matter has been thoroughly discussed in all its bearings. . . . The laws originate in the decisions of the chief and his council; but the same council forms the great law-court of the tribe, in which the chief sits as judge, and afterwards enforces the execution of his own sentences, or perhaps inflicts the awarded punishment with his own hand.

It is needless to enlarge on the practical effect of this. It is universally admitted to be dangerous to the claims of justice, when the same party that is to administer the law is entrusted to make it. It affords no guarantee for the uniform administration of justice. There is no "*letter of the law*" to appeal to, and thus there is much

scope for the exercise of favoritism; of which, doubtless, from the powerful influence of the principal councillors, very much exists. . . . The laws of the Kafir tribes are but a collection of *precedents*, consisting of the decisions of the chiefs and councils of bygone days, and embodied in the recollections, personal or traditional, of the people of the existing generation. That these decisions, in the first instance, were founded upon some general notion of right, is not unlikely. It is not, however, to the abstract merits of a case that the appeal is now ordinarily made, in legal discussions, but to what has been customary in past times. The decisions of deceased chiefs of note are the guide for the living in similar circumstances. The justice of those decisions is usually assumed as a matter of course, no one presuming to suppose that an Amaxosa chief, any more than an English king, can do "wrong." . . .

A distinction obtains in some respects similar to that which exists amongst us between Criminal and Civil law. In one class of cases the *chief* is always considered the aggrieved party, and the action is always entered on his behalf. In the other, the *people* are the only parties concerned, the chief having to do with the matter in his capacity of judge merely. The principle which regulates the classification of cases is, however, one that makes a very different division of the civil from the criminal to that which obtains in civilized jurisprudence. This principle is, that a man's *goods* are his own property, but his *person* is the property of his chief. Thus, if his possessions be invaded, he claims redress for himself; but if his person be assaulted, and bodily injury be the result, it becomes *his owner's* concern. . . .

The course of law in Kafirland proceeds on a principle the very reverse of that which regulates English administration of justice. We assume the accused party innocent till his guilt is proved. In Kafirland he is held guilty till he can demonstrate his innocence. With us, *witnesses* must supply the grounds upon which the case is to be decided. Amongst the Kafirs, the accused party *himself* is subjected to a most rigorous cross-examination, varied and repeated at the pleasure of his examiners, and every advantage is taken of his mistakes or self-contradictions.

The conduct of a Kafir law-suit through its various stages is an amusing scene to any one who understands the language, and who marks the proceedings with a view to elicit mental character.

When a man has ascertained that he has sufficient grounds to enter an action against another, his first step is to proceed, with a party of his friends or adherents, armed, to the residence of the person against whom his action lies. On their arrival, they sit down together in some conspicuous position, and await quietly the result of their presence. As a law party is readily known by the aspect and deportment of its constituents, its appearance at any kraal is the signal for mustering all the adult male residents that are forthcoming. These accordingly assemble, and also sit down together, within conversing distance of their generally unwelcome visitors. The two parties perhaps survey each other in silence for some time. "Tell us the news!" at length exclaims one of the adherents of the defendant, should their patience fail first. Another pause sometimes ensues, during which the party of the plaintiff discuss in an undertone which of their company shall be "opening counsel." This decided, the "learned gentleman" commences a minute statement of the case, the rest of the party confining themselves to occasional suggestions, which he adopts or rejects at pleasure. Sometimes he is allowed to proceed almost uninterrupted to the close of the statement, the friends of the defendant listening with silent attention, and treasuring up in their memories all the points of importance for a future stage of the proceedings. Generally, however, it receives a thorough sifting from the beginning, every assertion of consequence being made the occasion of a most searching series of cross questions.

The case thus fairly opened, which often occupies several hours, it probably proceeds no farther the first day. The plaintiff and his party are told that the "men" of the place are from home; that there are none but "children" present, who are not competent to discuss such important matters. They accordingly retire, with the tacit understanding that the case is to be resumed the next day.

During the interval, the defendant formally makes known to the men of the neighbouring kraals that an action has been entered

against him, and they are expected to be present on his behalf at the resumption of the case. In the meantime, the first day's proceedings having indicated the line of argument adopted by the plaintiff, the plan of defence is arranged accordingly. Information is collected, arguments are suggested, precedents sought for, able debaters called in, and every possible preparation made for the battle of intellects that is to be fought on the following day.

The plaintiff's party, usually reinforced both in mental and in material strength, arrive the next morning and take up their ground again. Their opponents, now mustered in force, confront them, seated on the ground, each man with his arms by his side. The case is resumed by some "advocate for the defendant" requiring a re-statement of the plaintiff's grounds of action. This is commenced, perhaps by one who was not even present at the previous day's proceedings, but who has been selected for this more difficult stage of the case on account of his debating abilities.

"Then comes the tug of war." The ground is disputed inch by inch; every assertion is contested, every proof attempted to be invalidated; objection meets objection, and question is opposed by counter question, each disputant endeavouring, with surprising adroitness, to throw the burden of answering on his opponent. The Socratic method of debate appears in all its perfection, both parties being equally versed in it. The rival advocates warm as they proceed, sharpening each other's intellects, and kindling each other's ardour, till, from the passions that seem enlisted in the contest, a stranger might suppose the interests of the nation to be at stake, and dependent upon the decision.

When these combatants have spent their strength, or one of them is overcome in argument, others step in to the rescue. The battle is fought over again on different grounds; some point, either of law or evidence, that had been purposely kept in abeyance being now brought forward, and perhaps the entire aspect of the case changed. The whole of the second day is frequently taken up with this intellectual gladiatorship, and it closes without any other result than an exhibition of the relative strength of the opposing parties.

The plaintiff's company retire again, and the defendant and his friends review their own position. Should they feel that they have been worsted, and that the case is one that cannot be successfully defended, they prepare to attempt to bring the matter to a conclusion by an offer of the smallest satisfaction the law allows. This is usually refused, in expectation of an advance in the offer, which takes place generally in proportion to the defendant's anxiety to prevent an appeal. Should the plaintiff at length accede to the proposed terms, they are fulfilled, and the case is ended by a formal declaration of acquiescence.

If, however, as it frequently happens, the case involves a number of intricate questions, that afford room for quibbling, the debates are renewed day after day, till the plaintiff determines to appeal to the decision of the *umpakati*, who has charge of the neighbouring district. He proceeds with his array of advocates to his kraal, and the case is re-stated in his presence. The defendant confronts him, and the whole affair is gone into anew on an enlarged scale of investigation. The history of the case, the history of the events that led to it, collateral circumstances, journeys, visits, conversations, bargains, exchanges, gifts, promises, threatenings, births, marriages, deaths, that were taken, paid, made, given or occurred in connection with either of the contending parties or their associates, or their relatives of the present or past generation, all come under review, and before the "court of appeal" has done with the affair, the history, external and internal, of a dozen families, for the past ten years, is made the subject of conflicting discussion.

The Resident Magistrate decides the case, if he can, after perhaps a week's investigation; but if not, or if either party be dissatisfied with his decision, an appeal can still be made to the chief "in council."

Should this final step be resolved on, the appealing party proceeds to the "Great Place." Here, however, more of form and ceremony must be observed than before. As soon as he and his company arrive within hearing, he shouts at the full extent of his voice "Ndimangele!" (I lodge a complaint.) "Umangele 'nto nina?" (You lodge a complaint of what?) is the immediate re-

sponse, equally loud, from whichever of the "men of the Great Place" happens to catch the sound. A shouting dialogue commences, the complainants approaching all the while till they have reached the usual position occupied on such occasions, a spot at the respectful distance of some fifty paces from the council hut. The dialogue lasts as long as the *umpakati* chooses to question, and then ceases. The complainants sit still.

Bye and bye someone else comes out of the house and sees the party. "What do *you* complain about?" "We complain about so and so;" and the case is begun afresh. He listens and questions as long as he likes, and then passes on. A third happens to be going by. The enquiry is repeated, and *again* a statement of the case is commenced. The *umpakati wakwomkulu* questions as he goes, and without stopping continues his interrogations till he is out of hearing. This tantalizing and seemingly contemptuous procedure is repeated at the pleasure or caprice of any man who chances to form one of the "court" for the time being, and it would be "contempt of court" to refuse to answer. At length, when it suits their convenience, the councillors assemble, and listen to the complainant's statement. The opposite party, if he has not come voluntarily to confront his accusers, is summoned by authority. On his arrival the former processes of statement and counter-statement are repeated, subject to the cross-examining ordeal through which old Kafir lawyers know so well how to put a man.

The chief meanwhile is perhaps lying stretched on a mat in the midst of his council, apparently asleep, or in a state of dignified indifference as to what is going forward. He is, however, in reality as wide awake as any present, of which he can generally give proof should he see fit to assume the office of examiner himself. He sometimes does so, after having listened to the debates that have taken place in his presence, and then decides the case. At other times he forms his decision upon the result of the investigation conducted by his councillors, and takes no part in the case but to pronounce judgment. On this being done, the party in whose favour judgment is given starts up, rushes to the feet of the chief, kisses

them, and in an impassioned oration extols the wisdom and justice of his judge to the skies. A party from the "Great Place" is sent with him to enforce the decision, *and bring back the chief's share of the fine imposed*, and the affair is at an end.

## 82. A Busy Court Day in a Barotse Village in Northern Rhodesia.<sup>1</sup>

### *A Pumpkin Vine leads to Lively Litigation.*

Imandi [the tribal chief] was holding court, and his village [Lukona] was a busy place. Every month or six weeks he comes from Lealui to his own village to attend to his own affairs and those of his district and to mete out justice to all who want it. . . .

If all courtrooms were as lovely as that at Lukona more real justice might be done; though, to be honest, I must say that the litigants seemed entirely uninfluenced by the surroundings, the beauty of the tree under which Court sat. It was an enormous *m'pundu*, a huge wide-spreading shade tree, in full bloom, the ground beneath it carpeted with its big, jagged, deep red blossoms.

At the proper moment Imandi emerged from his *lilapa*, the little fence around all Barotse huts, and took his place on the mat which had been spread for him. M'Bubu [the village deputy-chief] sat at his left in his usual somnolent state; other ancients close to Imandi; and the younger rabble formed a semi-circle as wide as the shade of the tree. From a fair distance, some women watched and tried to hear, for according to custom they are barred from court and the general give and take of opinion, except when they have a case to present or are called as witnesses. All the men of the countryside, however, gathered to hear the gossip and the latest scandal.

The plaintiff in the first case was a woman who accused the family doctor of murdering her husband by giving him a medicine that killed him. As evidence, the doctor produced the roots which he said he had given the husband. Both sides were heard, all the details of the illness thrashed out, and the roots passed down from

1. From *Margaret Carson Hubbard*, "African Gamble", New York, G. P. Putnam's Sons, 1937, p. 152.

hand to hand to be smelled, sniffed, examined by experts. All were agreed, apparently, that they were not poisonous. Imandi, however, must have had some reservations. At least he was shrewd enough not to decide a murder case himself, but to send it on to the native Commissioner for his district. Let the white man condemn a man for a murderer if he wishes, Imandi was going to take no chances. Poison is still used so freely that any smart chief thinks twice before he makes an enemy. . . .

The next case, too, was brought by a woman. She came from fifteen miles away, with a whole procession of her friends and enemies, all of them bent on settling a case that had its root in a pumpkin stick. The defendant was a half blind ancient, scrawny, skinny,—easily the type one might suspect of being a witch. In all solemnity she was accused of having knocked down a stick on which a pumpkin vine belonging to the plaintiff was trained. Joined by their friends, the women had set on each other. The plaintiff, a younger woman, had shrieked at the old woman for disturbing her garden. And the crime lay in the fact that the defendant said that she wished the younger woman, the owner of the stick, would die. Now to wish such a thought is after all enough to bring it about. This was her crime.

Witnesses were brought forward and a lurid picture drawn of the dreadful way the older woman was beaten up, a hell-fire-and-damnation picture drawn of what might follow on wishing the younger woman dead. For two hours I listened to the bickering back and forth. By then it was well past lunch time, and I was starved. N'Yambe noticed my wan and hungry look and suggested that we get back to camp. "You know women," he said, "they'll go on talking until the sun's down." . . .

The majority of cases brought before the native courts have to do with domestic relations. A woman brought suit against a divorced husband for unpaid alimony. Oh, yes—the civilized world has no corner on divorce. It is an old Barotse custom. The woman was too old to do much in a garden and had not remarried. The man was behind on his alimony. How much he had to contribute to her support was determined in relation to

what he produced. Witnesses corroborated her statements about receipts. And the Court found that the ex-husband must contribute either a given amount of grain or work a given length of time in her garden.

Everyone enjoyed the trial, and Imandi was a consistently impartial judge, patient even with absurdities. If any of the audience had an opinion, they were at liberty to express it, but order was kept at all times, no matter how heated the proceedings might be, how violent the sides taken. There was a surprising dignity to that Court.

### 83. A Homicide Trial in the Mano Tribe of the Liberian Hinterland.<sup>1</sup>

#### *The Culpit's Village Clan buys off his Guilt.*

[The narrator, who lived for some time in the Liberian Hinterland, and gained the confidence of the native tribes by her skill as a doctor, here tells of a trial for a homicide by a native who was weak-minded:]

When I came home one evening in the twilight from a hunting expedition, I was all the more astonished to find a huge crowd of people running about the village, brandishing weapons and shouting like mad. The whole thing looked like an ant-heap whose harmony had been disturbed by some outside agency.

I caught hold of a man and asked, "What's up?" The man glared at me as if he were mad, roared something about having to go and fight, brandished his bush-knife and disappeared. I got no more out of a second man. . . . At last I got hold of Blege; he was standing among a group of men who were all shrieking excitedly at once. Blege was excited too, but he was in a more reasonable frame of mind than the rest, since he belonged to another tribe, and never got too excited about Kran affairs.

"What's up?" I asked. "Oh, Ma'am, a woman has been murdered!"

1. From *Etta Donner*, "Hinterland Liberia", translated from the German by *Winifred M. Deans*; Glasgow, Blackie & Son, 1939, p. 245.



"Where is she?" "In the next village; her husband attacked her with a bush-knife. She comes from this village, and belongs to Sia's family." . . .

"When did all this happen?" "This morning," somebody said. "Bring the woman to me! I will make medicine for her, perhaps I can cure her." "Yes, that's so," said somebody. "But first we must get the murderer, the murderer!" The speaker's voice rose in fanatical hatred. Blege said Seweh had done something about getting the woman brought to me; but all thought that she must die. . . . Seweh gave a deep sigh. "I have been trying hard all the time to get the people to see reason, but they are determined to go and attack the next village."

"What for? What can the other village do about it? They should catch the murderer and then be at peace!"

A woman ran past us, beating her breast with her fists, and shrieking, "Murdered, murdered!" Her shrill voice was heard above all the tumult of voices and helped to add to the general excitement.

"Look at her!" said Seweh. "It is an old custom among our people, and other tribes too for that matter, to take the hostile village by storm in such circumstances." "The other people are not to blame," I objected. Often the other village people hide the evil-doer as being one of themselves. Hence it has been the custom from time immemorial to fall on the whole village and if possible cut down every person within reach. . . .

"I don't think they will wait to see whether the other village is hiding the murderer or not," said Blege in a very anxious tone.

Here all the wildness of primitive man had blazed up again. Clan was about to fight against clan, rooted customs were victorious over humanity and reason. An occurrence like this forms the start of most of the wars among these peoples—wars which before the time of the Liberian administration split up and laid waste the country, rendering any higher civilization or political unity out of the question. . . . These joint-families or clans hold together remarkably strongly. They join in avenging every in-

jury done to any of them, and they stand by those among them who have themselves got into difficulties, no matter whether these are due to guilt or to misfortune. . . .

According to old rule, murder or attempted murder is generally expiated among these tribes by payment of a fine. Sentence of death in a public tribal court of justice is said to be extremely rare. But the Kila, a secret society which in Eastern Liberia plays a part somewhat like that of the Poro Society in Western Liberia, had a sort of *Femgericht* or secret tribunal, which was held in the bush with the greatest secrecy. Any native accused and convicted by it vanished without a trace. In such a case not even a member of the missing man's clan dared to utter a complaint. The Kila is feared like death itself, and no one dares take any proceedings against it. Among the natives, in fact, this secret court is regarded as very important, and also as just. Among the Mano people, where the Poro and Kila Societies meet, the Kila comes under the auspices of the Poro Society, that is, only old and particularly exalted members of the Poro can hold office in the Kila. Nowadays even the secret court is no longer of much importance, and in the course of my second journey I learned that the Kila had been forbidden, though no doubt it will continue to exist a little longer in secret. . . .

On the second day the injured woman was quiet, patient and a little frightened, not saying a word unless spoken to. . . . I did not pursue the conversation further, but merely warned Sia, the irritated chief, that he would find himself in difficulties if he did not hand over the prisoner alive to the District Commissioner. The woman was no longer in danger and he had no justification for endangering the life of the man, who must have acted in the height of passion. Friend Sia went away visibly annoyed.

During the next few days all the paramount chiefs and clan chiefs of the neighbourhood arrived. The Palaver House was overflowing; the case was argued in unbelievable detail and with great enthusiasm. Really the prisoner should have been taken to Tchien; but it had unanimously been decided to begin by extorting as high a fine as possible from his family, and it was gradually al-

lowed to leak out that if this fine were sufficiently large, the prisoner perhaps need not be handed over at all.

Every day relatives of the prisoner brought in fines, in the shape of a young bull, goats, fowls and copper dishes. A number of heavy brass rings were also used as a means of payment. Each article had a definite cash value (which differs in different districts); even old bottles, which are rarities in the bush, were dragged along and counted in. The family paid up willingly in the hope of thereby purchasing the freedom of one of their members. The injured woman's clan got something, but the numerous chiefs present also demanded their share. It looked to me as if the prisoner's clan would be properly fleeced, for the goods they brought in were worth and pounds and pounds. This was probably by way of compensation for the feast the village people had been done out of by my presence. . . .

Formerly magic drinks played a special part in legal proceedings among these tribes, being used to establish the guilt or innocence of an accused person. . . . A substance of this kind which is in general use is *kefu*, the "oath medicine". A bottle of this concoction hangs in every Palaver House and is administered quite officially to everybody who has a statement to make in court. If his evidence should be false, *kefu* will make him ill until he is brought before the court himself and confesses his lie. I was not told whether this often happens. In addition to this, almost every chief's territory has its own special magic on which accuser and accused, and also the witnesses, have to take the oath to tell the truth. Lying is so common and so widely recognized as a habit with these people that no statement in court is taken seriously at all in the absence of the oath magic. The fear of the moral power of a magic medicine can alone make truth prevail. . . . For the black man backs up his family unconditionally, without worrying about whether he is thereby doing harm to the tribe as a whole, for he has no consciousness of political unity. The truth can go hang provided what he says and does is to the advantage of his family, *his* unit.

#### 84. Trial Procedure in the Old Ashanti Kingdom.<sup>1</sup>

##### *A Single Witness Decides the Case.*

It has been seen that all offences which were in any way regarded as violations of tribal taboos were investigated before a tribunal which consisted of the Head-Chief and his body of Counsellors, while all other cases were settled more or less privately or unofficially by and among the parties concerned. . . . The following is an account of a trial, . . . more or less a translation in the vernacular:

Mondays, Thursdays, and Saturdays were known all over Ashanti as "male days", for it was on these days that all serious matters were conducted, e. g. funeral customs, enstoolments, leaving the town and going into the war camp, and finally the hearing of the more important court cases. Such a case might have its origin as follows:

Two men were quarrelling and they began to abuse each other; one slapped the other; he asked, "Why did you slap me?" The other replied, "You abused me". The other man retorted, "I speak the great forbidden name that I did not abuse you". The second man accepted this challenge. It now behooved any person who was present and heard these words, immediately to effect the arrest of both parties; should he not have done so, he would himself become guilty of an offence. A recognized fee of 13s. was attached to this duty; it was paid by the persons who were arrested, and ensured the matter being reported without delay to the Chief whose "oath" had been "sworn". Both prisoners were now probably fastened with an iron staple to a portable log, for both were treated as guilty, which indeed in a sense they were, for each had spoken the great forbidden word. The two prisoners were now led before the Chief; the *Okyeame* would call on the man who arrested them to come forward and state that he heard the prisoners speak the great forbidden word and in consequence arrested them. The *Okyeame* would then inquire who was the first person to violate the tribal

1. From Captain R. S. Rattray, "Ashanti Law and Constitution", Oxford, Clarendon Press, 1929, p. 379.

taboo. The one who did so became what we should term the plaintiff, while the other was the defendant, although there did not appear to be any distinctive terms in Ashanti.

A day was now appointed for the hearing of the case; meanwhile the prisoners might be kept "in log" and were looked after by the person who originally effected their arrest.

On the day appointed for the trial, the Chief and his councillors would assemble in the *gyase kesie*, or *gyasewa* courtyards, according to whether the case was considered of greater or less importance. Opposite the Chief sat the *Ko'ntire* and *Akwamu* Elders side by side, while other Elders and sub-Chiefs sat grouped on the Chief's left and right, each occupying the exact position assigned to him by tribal custom. In most Divisions an important case might not be heard unless the councillors known as the *Ko'ntire* and *Akwamu* were present.

The prisoners were now led forward, still attached to their logs, which were not removed during the trial. Their custodian would first relate where, when, and why he arrested them. The plaintiff, i. e. he who first spoke the forbidden word, would be addressed by the *Okyeame* with the words, "State your case". This he would do without any oath being administered, or any admonition whatever to speak the truth. He gave his version of the affair, uninterrupted save by the shrill cries of the heralds, *Yen tie o! yen to kom! odedew!* and the deep *Yon!* with which the *Okyeame* punctuated the oration. The plaintiff, having stated his case, concluded with the customary formula: "If the statement which I have spoken is not the truth, and if I have made up anything, then I stand to bear the penalty, for I have spoken the great forbidden name."

Next, the defendant gave his version of what happened, generally ending with an affirmation that all the plaintiff had just related was false. He, in turn, wound up his speech with a similar declaration as the above to its truthfulness. The *Okyeame* would now stand up and repeat almost word for word all that the plaintiff had said, finishing by addressing to him the question, "Were these the words from your mouth, or do I lie?", to which he would reply,

"These were the words from my mouth". The *Okyeame* would next repeat what the defendant had said, put a similar question to him, and receive a similar answer. He would then turn towards the Elders and say, "That is what they have said". The *Ko'ntire* and *Akwamu* and any one else who had anything to say might now rise up and examine and cross-examine the accused; all questions were put through the *Okyeame*.

During this interrogation, one or other of the party-prisoners might say, "I have a witness". The other party-prisoner was asked if he also wished this witness to be called, and he would agree, or had to give very special reasons for refusing his services. The Elders would now ask the Chief for a messenger in order that the witness might be summoned to appear before the court. Before this messenger departed, he was sworn as follows: The *Okyeame* addressed him, saying: "Swear by the god So-and-so that you will not carry on any conversation about what you have heard concerning the case at the place to which you are setting out". The messenger would raise his hand and swear, saying: "May the god So-and-so kill me if I talk about what I have heard!" . . . The *Okyeame* would now address the two party-prisoners and say: "If that witness comes and says this, and this, and this, you (the plaintiff) will be in the right; but if he comes and declares he has not heard (understood?), in that case you are guilty".

If the messenger could not return forthwith with the witness, the Court would adjourn. This was done in the following manner: The Chief (who by the way was usually dressed in an *edin-kira* cloth) gave the first signal by lifting first one foot and then the other from the ground, and slapping his thighs; thereupon the executioners and heralds and other attendants exclaimed, "Somewhere is stirring, some place is moving". The Chief would repeat these actions, and the third time would rise up, no sooner having done so than all the executioners shouted "Rise". The Chief and his immediate following would pass out of the *gyase* courtyard, every one remaining until he had gone. . . . When the witness arrived, the Court again assembled and the party-prisoners were again brought before it.

The first business in hand was the swearing of the witness. The *Okyeame* addressed him, saying: "Call upon the gods So-and-so and So-and-so and swear that you will speak the truth about the matter concerning which we shall ask you". The witness would then say: "Gods So-and-so and So-and-so, I shall speak what I know to be true; if I do not thus speak truthfully, may the gods kill me!" Next the *Okyeame* would himself call upon the gods, saying "Gods So-and-so and So-and-so, this fellow (subject) will bear witness; if he does not speak that which he knows, or if he tells lies, then must you kill him". Again the *Okyeame* addressed the witness, saying: "Speak the great forbidden name". He did so, again affirming that he would speak the truth. These important preliminaries over, the *Okyeame* would bid the witness speak what he knew about the case, saying some such words as "What do you know with regard to the case between these two people?" The witness then gave his sworn evidence.

When he had concluded, the *Okyeame* would address the party against whom the evidence had been given, in the following words, which were in the nature of a set legal formula always employed on such occasions:

"You have heard what your witness has said; had you not come here that we might take good ears to hear (your case), then it would have been as if you had lifted some stick and clubbed the *Okyeame*, killing him, as if he were some brute beast; you are guilty."

All those present broke out into the Ashanti exclamation, "*e! e! e!*". The heralds came forward and sprinkled white clay on the back of the man who was acquitted, who, however, still had to pay the customary *aseda*. The guilty party would commence to supplicate the Elders, saying, "I flee and join myself to you, and I give grandsire (i. e. the Chief) the justice of his cause".

The Elders would report to the Chief, who would order the guilty man to be taken away. He would later pass sentence upon him, either ordering him to be killed or perhaps permitting him to buy his head. This completes an account of the procedure before and during a trial in the old Divisional Head-Chief's court.

Several points in the foregoing narrative are worthy of special consideration:

(a) Neither plaintiff nor defendant gave their evidence upon oath. . . . Each party, being his own advocate, was expected to make out the best possible case for himself; each would "lie" if it suited his purpose. . . .

(b) Very different was the procedure even in case of the messenger sent to call the witness; every precaution was taken to ensure that he would observe the instructions given him not to discuss the case with the witness whom he was sent to call.

(c) The witness himself was carefully and systematically sworn upon two gods, *selected not by himself, but by the representative of the Chief*. He took a solemn oath upon these deities to speak the truth, and called upon them to kill him should he lie. The *Okyeame* himself called upon the same powers to punish the witness should he deserve it, and finally the witness himself was made to speak the great forbidden name that his version of the affair which he was about to give was truthful and correct. These drastic precautions were essential because *the result of the trial depended upon the testimony of this one individual*. I asked if several witnesses were not called, and was informed, "No, only one, mutually agreeable to both parties".

The idea of a witness being friendly or hostile to one or other of the litigants seemed unthinkable. The sanctity and nature of the oaths taken and the deadly sanctions behind them seemed to the Ashanti mind to rule out most of the possibility of bias or lying.

*Chapter 18*  
**OTHER REGIONS**

## OTHER REGIONS .

85. A Trial in Tripoli, A.D. 1584.<sup>1</sup>*The Captured Christians finally Escape.*

[In the year 1583, the 100-ton ship *Jesus* set out on October 16 from Portsmouth for "Tripoli in Barbary", i.e. the north coast of Africa. She was chartered by Sir Edward Osborne, Chief Merchant of the Turkey Company. Tripoli was then a part of the Turkish Empire; the Bey of Tripoli (herein called the King) being subject to the Sultan at Constantinople.

The master of the *Jesus* was Zaccheus Hellier, the mate Richard Morris; the factors, representing the cargo-merchants, were Romaine Sonnings and Richard Skegs.

On Jan. 8, 1584, the *Jesus* arrived at Tripoli, and its people were "very well entertained by the King of that country". Indeed the King promised them that if they would sell all their cargo to him alone, he would allow them to take away tax-free all the oils that they should buy in exchange.

Now there was at Tripoli an Italian named Norado, enslaved for debt; and he plotted to escape. So Sonnings, the factor of the *Jesus*, promised to take him aboard secretly when the ship sailed. On May 1, 1584, the ship was working away from its anchorage and Norado had been got aboard. But his master, discovering his escape, reported it to the King, who sent to forbid the *Jesus* to depart. But Sonnings ordered the captain to ignore the King's summons, and the ship kept slowly on its way out. The King's gunners, however, disabled it with a few shots from the shore. The ship's crew disembarked, were put in chains, and were taken to prison to await trial.

1. From *Thomas Sanders*, "A Most Lamentable Voyage made into Turkey", first printed in Hakluyt's "Voyages, etc." 1589; here taken from *O. Raymond Beazley*, editor of "Voyages and Travels" (Constable, London, 1903), Vol. I, p. 243.

## Chapter 18

85. *A Trial in Tripoli, A. D. 1584.*  
*The Captured Christians finally Escape.*
86. *The Street-Court Trials of Ethiopia.*  
*Any Worthy Citizen may become a Judge.*
87. *Justice for Foreigners at the Pyramids of Egypt, A. D. 1851.*  
*The Sheikh after full hearing orders the Bastinado.*
88. *Trial by the Islamic Law in modern Tunis.*  
*An Englishwoman seeks Divorce from a Mohammedan Husband.*

What followed is here narrated by one of the crew, upon his return to England:]

And the 2nd day of the same month, the King with his Council [*Divan*] sate in judgement upon us. The first that were had forth to be arraigned were the factors and the master. The King asked them, "Wherefore came they not ashore when he sent for them?" Romaine Sonnings answered, that "though he were King on shore, and might command there; so was he [Sonnings] as touching those that were under him," and therefore said, "if there be any offence, the fault is wholly in myself, and in no other." Then forthwith the King gave judgement that the said Romaine Sonnings should be hanged over the north-east bulwark [rampart], from whence he conveyed the forenamed Patrone Norado.

Then he called for our master, Andrew Dier, and used few words to him; and so condemned him to be hanged over the walls of the westernmost bulwark. Then fell our other factor, named Richard Skegs, upon his knees before the King, and said, "I beseech your Highness either to pardon our master, or else suffer me to die for him. For he is ignorant of this cause." Then the people of that country favouring the said Richard Skegs, besought the King to pardon them both. Then the King spake these words, "Behold, for thy sake, I pardon the master!" Then presently the Turks shouted, and cried, saying, "Away with the master from the presence of the King!" Then he came into the *bagnio* [prison] where we were, and told us what had happened: and we all rejoiced at the good hap of Master Skegs; that he was saved, and our master for his sake.

But afterwards our joy was turned to double sorrow, for in the mean time the King's mind was altered, for that one of his Council had advised him that, unless the master died also, by the law they could not confiscate the ship nor goods, nor captive [enslave] any of the men.

Whereupon the King sent for our master again, and gave him another judgement, after his pardon for one cause; which was that he should be hanged.

Here all true Christians may see what trust a Christian man may put in an infidel's promise; who, being a King, pardoned a man now, as you have heard, and within an hour after hanged him for the same cause before a whole multitude, and also promised our factors their oils custom free, and at their going away made them pay the uttermost penny for the custom thereof.

When Romaine Sonnings saw no remedy but that he should die he protested to turn Turk, hoping thereby to have saved his life. Then said the Turk, "If thou wilt turn Turk, speak the words that thereunto belong!" and he did so. Then said they unto him, "Now thou shalt die in the faith of a Turk!" And so he did, as the Turks reported that were at his execution.

The forenamed Patrone Norado, whereas before he had liberty, and did nothing; he was then condemned to be a slave perpetually; unless there were payment made of the foresaid money.

Then the King condemned us all—who were in number six and twenty; of the which, two were hanged, as you have heard, and one died the first day we came on shore by the visitation of Almighty God—the other three and twenty he condemned to be slaves perpetually unto the Great Turk; and the ship and goods were confiscated to the use of the Great Turk. . . . .

Now to pass over a little, and so to show the manner of our deliverance out of that miserable captivity.

In May [1584] aforesaid, shortly after our apprehension, I wrote a letter into England unto my father dwelling at Eavistoke [Tavistock] in Devonshire, signifying unto him the whole state of our calamities; and I wrote also to Constantinople to the English Ambassador; both of which letters were faithfully delivered.

But when my father had received my letter, and understood the truth of our mishap and the occasion thereof, and what had happened to the offenders, he certified the Right Honourable the Earl of Bedford thereof, who, in short space, acquainted Her Highness with the whole cause thereof; and Her Majesty, like a merciful Princess tendering her subjects, presently took order for our de-

liverance. Whereupon the right worshipful Sir Edward Osborne, Knight, directed his letters [5th of September, 1584] with all speed to the English Ambassador in Constantinople to procure our delivery. He obtained the Great Turk's Commission [October, 1584] and sent it forthwith [January, 1585] to Tripoli by one Master Edward Barton [his secretary], together with [Mahomet Beg] a Justice of the Great Turk's; one soldier, another Turk; and a Greek who was his interpreter, and could speak Greek, Turkish, Italian, Spanish, and English.

When they came to Tripoli, they were well entertained; and the first night, they did lie in a captain's house in the town. All our company that were in Tripoli came that night for joy, to Master Barton and the other Commissioners to see them. Then Master Barton said unto us, "Welcome, my good countrymen!" and lovingly entertained us; and at our departure from him, he gave us two shillings, and said, "Serve God! for to-morrow I hope you shall be as free as ever you were." We all gave him thanks, and so departed.

The next day in the morning, very early, the King having intelligence of their coming, sent word to the Keeper that "none of the Englishmen," meaning our company, "should go to work."

Then he sent for Master Barton and the other Commissioners, and demanded of the said Master Barton his message. The Justice answered that "the Great Turk my Sovereign had sent them unto him, signifying that he was informed that a certain English ship called the *Jesus* was by him, the said King, confiscated about twelve months since; and now my said Sovereign hath here sent his especial Commission by us unto you for the deliverance of the said ship and goods; and also the free liberty and deliverance of the Englishmen of the said ship, whom you have taken and kept in captivity." And further the same Justice said, "I am authorised by my said Sovereign the Great Turk to see it done; and therefore I command you by virtue of this Commission presently to make restitution of the premises or the value thereof." So did the Justice deliver unto the King the Great Turk's Commission to the effect aforesaid; which Commission the King with all obedience perused.

After the perusing of the same, he forthwith commanded all the English captives to be brought before him; and then willed the Keeper to strike off all our irons. Which done, the King said, "You Englishmen! for that you did offend the laws of this place,—by the same laws therefore, some of your company were condemned to die, as you know; and you to be perpetual captives during your lives. Notwithstanding, seeing it hath pleased my Sovereign Lord the Great Turk to pardon your said offences, and to give you your freedom and liberty; behold, here I make delivery of you to this English gentleman!"

So he delivered us all that were there, being thirteen [or rather eleven] in number, to Master Barton; who required also those two young men which the King's son had taken with him. Then the King answered that "It was against their law to deliver them, for that they had turned Turks." And touching the ship and goods, the King said that "he had sold her; but would make restitution of the value, and as much of the goods as came unto his hands."

So the King arose, and went to dinner; and commanded a Jew to go with Master Barton and the other Commissioners to show them their lodging, which was a house provided and appointed them by the said King. And because I had the Italian and Spanish tongues, by which most of their traffic in that country is, Master Barton made me his cater to buy his victuals for him and his company, and delivered me money needful for the same.

Thus were we set at liberty the 28th day of April, 1585.

## 86. The Street-Court Trials of Ethiopia.<sup>1</sup>

*Any Worthy Citizen may become a Judge.*

[The daily scene of Justice in Ethiopia, when it was independent, has been thus described by an observer:]

Ethiopia has its Supreme Court, which today still passes judgments according [traditionally] to the laws of Solomon. This

1. From *Harold P. Lechenberg*, "Open-Air Courts of Ethiopia", *National Geographic Magazine*, 1935, Vol. LXVIII, p. 633.



Court has jurisdiction in all important cases, such as those which involve murder or inheritance disputes. After it come the district law courts, which try more petty cases; their judges are chosen for the most part from among city and town officials, in whom the Government vests power to administer justice. Such officials may, in turn, delegate judicial powers to two worthy inhabitants as assistants. These [last] Courts use no regular court building, but meet for trials on any convenient street corner or village plaza. There, like shopkeepers or street peddlers, they may sit down and wait for cases to come. Because of the incessant haggling common in all Ethiopian trade transactions, these street courts seldom have to wait long before litigants appear.

Any citizen who feels he has been wronged may demand that his aggressor go with him to the nearest judge. Such a challenge is usually accepted at once, as the people seem to enjoy litigation. Should an alleged wrongdoer refuse, a plaintiff may go to the judge, who will then assign two stalwart citizens to fetch the other party, by physical force if need be, in the interest of "ethics." Accuser and accused each has the right to give a detailed account of his case; to bring all witnesses to the spot who may help verify his statements; and also to question such witnesses. He who for any reason will not conduct his case alone may take a lawyer; many self-made lawyers, listening eagerly and freely commenting on the case, are always found in street crowds, attracted by these open-air courts. The noisy, free-for-all courts permit endless oratory, on themes relevant and irrelevant, in which both plaintiff and defendants may also distinguish themselves. Speeches may dissect any topic, from private scandal to the Nation's gravest foreign affairs. Hence a visit to such courts is, for the Ethiopian, not only amusing but also a source of political instruction. At most of such courts the crowd seeking justice is so large that trials are held daily, without interruption, from 9 o'clock in the morning until 5 in the afternoon.

One reason for the popularity of these law courts is that here the native passion for gambling is officially linked with the search for truth and justice. Either or both plaintiff and defendant, when he

has made a statement, may lay a bet that he is right, and that the Court will so find. Half a sheep, a pound of flour—even a white horse—may be wagered, depending on the importance of the dispute. If one litigant offers such a bet, the other can only 'take the bet,' or else retract his own statement and thus lose the suit. Often, in the end, these bets are worth more than the trifling object which started the quarrel.

## 87. Justice for Foreigners at the Pyramids of Egypt, A.D. 1851.<sup>1</sup>

*The Sheikh, after full hearing, orders the Bastinado.*

[The narrator—America's most famous traveller of the last century—is visiting the Pyramids, accompanied by his dragoman Achmet:]

The sun glared hot on the sand as we toiled up the ascent to the base of Cheops, whose sharp corners were now broken into zigzags by the layers of stone. As we dismounted in his shadow, at the foot of the path which leads up to the entrance, on the northern side, a dozen Arabs beset us. They belonged to the regular herd who have the Pyramids in charge, and are so renowned for their impudence that it is customary to employ the janissary of some Consulate in Cairo, as a protection.

Before leaving Gizeh I gave Achmet my sabre, which I thought would be a sufficient show to secure us from their importunities. However, when we had mounted to the entrance and were preparing to climb to the summit, they demanded a dollar from each for their company on the way. This was just four times the usual fee, and we flatly refused the demand. My friend had in the mean time become so giddy from the few steps he had mounted, that he decided to return, and I ordered Achmet, who knew the way, to go on with me and leave the Arabs to their howlings. Their leader instantly sprang before him, and attempted to force him back. This was too much for Achmet, who thrust the man aside, whereupon he was instantly beset by three or four, and received several hard

1. From *Bayard Taylor*, "A Journey to Central Africa," New York, G. P. Putnam, 1862, 11th edition, chap. V, p. 58.

blows. The struggle took place just on the verge of the stones, and he was prudent enough to drag his assailants into the open space before the entrance of the Pyramid. My friend sprang towards the group with his cane, and I called to the donkey-driver to bring up my sabre, but by this time Achmet had released himself, with the loss of his turban.

The Arabs, who at first had threatened to kill Achmet, now came forward and kissed his hands, humbly entreating pardon. But his pride had been too severely touched by the blows he had received, and he repulsed them, spitting upon the ground, as the strongest mark of contempt. We considered it due to him, to ourselves, and to other travellers after us, to represent the matter to the Shekh of the Pyramids, who lives in a village called Kinnayseh, a mile distant, and ordered Achmet to conduct us thither.

On reaching the village we found that the Shekh was absent in Cairo, but were received by his son, who, after spelling out a few words of my Arabic passport and hearing Achmet's relation of the affair, courteously invited us to his house. We rode between the mud huts to a small court-yard, where we dismounted. A carpet was spread on the ground, under a canopy of palm-leaves, and the place of honor was given to us, the young Shekh seating himself on the edge, while our donkey-drivers, water-boys and a number of villagers, stood respectfully around. A messenger was instantly despatched to the Pyramids, and in the mean time we lighted the pipe of peace. The Shekh promised to judge the guilty parties and punish them in our presence. Coffee was ordered, but as the unlucky youth returned and indiscreetly cried out, "*Ma feesh!*" (there is none!) the Shekh took him by the neck, and ran him out of the court-yard threatening him with all manner of penalties unless he brought it.

We found ourselves considered in the light of judges, and I thought involuntarily of the children playing Cadi, in the Arabian tale. But to play our Cadi with the necessary gravity of countenance was a difficult matter. However, the Shekh, who wore a red cap and a single cotton garment, treated us with much respect. His serene, impartial demeanor, as he heard the testimony of the vari-

ous witnesses who were called up, was most admirable. After half an hour's delay, the messenger returned, and the guilty parties were brought into court, looking somewhat alarmed and very submissive. We identified the two ringleaders, and after considering the matter thoroughly, the Shekh ordered that they should be instantly bastinadoed. We decided between ourselves to let the punishment commence, lest the matter should not be considered sufficiently serious, and then to show our mercy by pardoning the culprits.

One of the men was then thrown on the ground and held by the head and feet, while the Shekh took a stout rod and began administering the blows. The victim had prepared himself by giving his bornous [cloak] a double turn over his back, and as the end of the rod struck the ground each time, there was much sound with the veriest farce of punishment. After half a dozen strokes, he cried out, "*ya salaam!*" [give me peace!] whereupon the crowd laughed heartily, and my friend ordered the Shekh to stop. The latter cast the rod at our feet, and asked us to continue the infliction ourselves, until we were satisfied.

We told him and the company in general, through Achmet, that we were convinced of his readiness to punish imposition; that we wished to show the Arabs that they must in future treat travellers with respect; that we should send word of the affair to Cairo, and they might rest assured that a second assault would be more severely dealt with. Since this had been demonstrated, we were willing that the punishment should now cease, and in conclusion returned our thanks to the Shekh, for his readiness to do us justice.

This decision was reached with great favor; the two culprits came forward and kissed our hands and those of Achmet, and the villagers pronounced a unanimous sentence of "*taib*" (good!) The indiscreet youth again appeared, and this time with coffee, of which we partook with much relish, for this playing the Cadi was rather fatiguing. The Shekh raised our hands to his forehead, and accompanied us to the end of the village, where we gave the coffee-bearer a backsheesh, dismissed our water-boys, and turned our donkeys' heads toward Abousir.

88. A Trial by Islamic Law in Modern Tunis.<sup>1</sup>*An English Wife seeks Divorce from a Mohammedan Husband.*

[The following vivid pen-picture (in the early 1900's) of a divorce-suit in the Cadi's court at Tunis gives us the atmosphere of a Mohammedan lawsuit in that region. The parties here were an Arab husband and his English wife and the narrator is a friend of the wife:]

All domestic or family affairs come before the Cadi, who for the time being represents Mohammed.

After satisfying the porter at the outer gate that we had no camera about our persons, we experienced no difficulty in gaining admittance to the square court-yard which faces the law-court, and which is exactly similar in the style of its architecture and in character to the colonnaded patio of all Arab houses. The little rooms where the judges administer justice open off this court-yard just as the bedrooms and public rooms opened off the two court-yards in Monsieur Amour's harem.

When we entered there were quite a number of long-bearded, high-stomached, pallid-faced Moors and elderly city-bred Arabs walking majestically about the sunny square, all carrying rolls of parchment in their hands—legal documents, I suppose . . . . I was suddenly confronted with the most Oriental picture I ever saw; there, in the centre of that green-lined court of the Cadi, stood Sylvia Ajeeb . . . . a slight, grey-clad English figure standing before three large and resplendent judges, who sat humped up on their yellow-slippered feet on broad green upholstered benches, surrounded by orange-yellows and lemon-yellows and grass-greens and almond-leaf greens and salmon-pinks. (This mingling of greens of every shade, from the pale pistachio green to the strong Mohammedan grass-green, and the variety of yellows ranging from orange to pale canary and lemon, is typically Mohammedan.) When my brain had found its focus I saw that Monsieur Ajeeb was standing beside his wife,—a magnificent figure in white

1. From *Norma Lorimer*, "By the Waters of Carthage", New York, Pott, 1906, p. 346.

cloth, his flowing cloak and clothes richly embroidered and tasselled with silver; and that this scene I had come upon so suddenly signified that Sylvia Ajeeb was standing before the Cadi—that she was, in plain English, being divorced. . . .

The court-house was long and narrow and ran broadside with the court-yard. The walls were hung with grass-green cloth, and green silk covered the benches and luxurious cushions . . . . The Judges sat cross-legged on high green hassocks underneath highly coloured texts from the Koran; and in all my days I have never seen three graver, wiser, more dignified figures . . . . The Supreme Cadi (or Sheik-ul-Islam, as he is called) sat on a similar green bench in a little green alcove at the end of the green room. He looked even more like a heathen god than the other three, and was still more gorgeously arrayed in salmon-pink and deep orange, and his lofty turban, my guide pointed out, had a vertical division right up the centre; this division of the folds signifies apostolic succession, so to speak. These coiled and towering white turbans give a very majestic and prophetic appearance to grave Eastern faces. Certainly these four wise men of the East looked as though the mantle of the Prophet had fallen upon them.

Have I in the faintest manner conveyed the picture to you? A vivid green room with nothing in it but the green-cushioned benches and the four stately turbaned figures seated on those benches in grave and awful silence, their orange draperies falling in long lines from their shoulders to the floor, their white-turbaned heads showing clearly against a background of grass-green . . . . I must own that dainty and beautiful as Sylvia is, she looked totally insignificant beside these Eastern potentates of ecclesiastical justice. The long flowing lines of the Arabs' dress make Western fashions look foolish and hopelessly vulgar.

With unchanging expressions they went on reading the long legal documents, which were rolled up just as all things that were written used to be rolled up in biblical days. As they turned the roll round and round, the parchment fell over their fine yellow slippers and almost touched the green carpet in front of them.

Poor little Sylvia, in her French frock and frills, was standing all this time in nervous silence before these sphinx-like representatives of the Prophet . . . . Monsieur Ajeeb's lawyer, who had apparently handed the judge the written account of the case, was standing close to the bench and occasionally whispered something to him . . . . But if the Cadi before whom she was standing had any thoughts upon the subject he did not show it by the lifting of even an eye-lash. I wondered if he would ever stop reading the document he held in his hand. How anxiously I watched the roll grow thinner and thinner, and the coil on the floor in front of him grow bigger and bigger. Would he never speak!

The text of the Koran on the wall opposite caught my eyes, and I kept repeating to myself the last prayer of the Prophet. I wondered if it was that prayer which was written on these green grasses in letters of quicksilver: "Lord grant me pardon and join me to the companionship of light." Outside this silent green tribunal of the Cadi I could see the beautiful court-yard filled with vibrating light. The black and white of the arches looked more black and white than ever by their contrast to the vivid colours within; the stucco-work of the colonnade hung like a veil of lace let down from heaven. It was a jewel stolen from the Arabian Nights, a jewel iridescent as an opal which caught its vibrations of colour from the delicate tints of the richly clothed Arabs and Moors who were strolling about, document in hand, awaiting their turn. . . .

I was standing just inside the wide open door thinking these thoughts, for you must not imagine that this solemn little court had seats for the curious, as our London law-courts have. No one was admitted into its sacred precincts but the three judges and the Sheik-ul-Islam, who sat apart in this holy of holies, and the four or five people connected with the case.

At last the judge before whom Madame Ajeeb was standing said something which made Monsieur Ajeeb motion to her to pass along to where the Sheik-ul-Islam was seated. . . . Not a muscle of his face moved nor a fold of his flowing salmon-tinted robes stirred, and not for one instant did he raise his eyes

from the parchment he held in his beautiful hands. The perfect calm of his attitude suggested the repose of a Buddha. You felt instinctively that the judgment of this representative of Mohammed would be a just judgment—the dignity of his features, with their superb expression of indifference, set him far above all bribes or petty partiality. Here was a great man so far removed from the common herd that he must have impressed even the most unimpressible. Justice seemed to emanate from every fold of his softly falling robe and to lie concealed in each roll of his prophetic turban.

. . . . Suddenly he also raised his head from the document he was studying and fixed his far-seeing eyes full on the face of the Englishwoman in front of him. . . . Still gazing at Sylvia, just as the man of the desert had gazed at her, and as though he could read on the whiteness of her soul all the thoughts that Allah alone knows, he suddenly asked first Monsieur Ajeeb and then his lawyer a few brief questions. Then twice he addressed Sylvia, prefacing all his questions with the familiar word "Bismillah!" (In the name of the Lord; this sentence begins every written document and is the opening sentence of every Mohammedan book). . . . Apparently her answers satisfied the Sheik, for he held up his hand as a signal for dismissal; the case was finished . . . . I wish I could have understood what the Sheik said to Monsieur Ajeeb, for I am sure he gave him a grave admonition. To Sylvia he gave his blessing, for I caught the words "Selam-a'-Alek!"—"The peace (of Allah) be with thee".

*Part IV. AMERICA*

*a. North America*

*Chapter 19*  
*PRIMITIVE NATIVE TRIBES*

## PRIMITIVE NATIVE TRIBES

[Introductory: Even when traced back into pre-historic times, the entire Indian population of the three Americas (before Columbus' day) was native to the land. But these earliest inhabitants had originally (as virtually all modern scholars agree) entered from Northern Asia, crossing via the Bering sea and islands in scattered groups at different times. All this was, say, 10,000 years ago and earlier.

In their gradual development they spread down throughout the three Americas, settling finally into three large and fairly distinct groups,—the North American, the Mexican (Toltec, Aztec, Maya), and the Andean (Chimu-Nasca, Inca). Of the very primitive inhabitants of the river-jungles of Venezuela and Brazil, little useful information is available.

For the Mexican group, something is offered *post*, Chap. 23, No. 117. For the Andean group, something is offered *post*, Chap. 24, No. 120.

Here we are concerned with the *North American* group.

A notable feature, bearing upon the development of social institutions and juristic ideas, is the extraordinary number of independent groups found in the vast region between the icy Arctic borders and the arid plains of the South. In the area now forming the United States there were represented some fifty distinct languages, with many more dialects. These could be grouped (by a modern authority<sup>1</sup>) into some eight principal family-stocks,—Algonkin, Iroquois, Muskogean, Caddoan, Siouan, Déné, Uto-Aztec, and Penutian; the more familiar tribal names—Pequot, Huron, Shawnee, Choctaw, Winnebago, and so on—being units amid one or another of these scientifically classified stocks. But within the Algonkin group alone (for example) there were some 100 independent tribes; and it is estimated that at the time of

1. Clark Wissler (of the American Museum of Natural History), "Indians of the United States: Four Centuries of their History and Culture", Chap. VI (New York, Doubleday, Doran & Co., 1940).

## Chapter 19

89. *Settlement of a Blood-Feud among the Hurons, A. D. 1636.*  
*The Nine Symbolic Gifts that Placate Vengeance.*
90. *Settlement of a Blood-Feud in the Manistee Tribe, A. D. 1819.*  
*A Young Indian Brave returns voluntarily to his Death.*
91. *A Trial for Homicide in the Pah Ute Tribe in California, A. D. 1853.*  
*Burning Alive as the Penalty.*
92. *Settlement of a Blood-Feud among the Algonkins in Wisconsin.*  
*The Ceremony of the Pipe of Peace.*
93. *A Blood-Feud Settlement among the Kwakiutl Tribe of British Columbia.*  
*The Disgrace of Hiring a Substitute to take Revenge.*
94. *Trial Procedure among the Eskimos.*  
*The Song-Duel of Greenland as a Method of Settling Disputes.*
95. *Trial Methods among the Sioux Tribes.*  
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96. *Trial of a Choctaw Chief for Homicide, A. D. 1940.*  
*Acquitted by a White Man's Jury, He Must yet Stand Trial by his Own Tribe.*

Columbus' arrival there were some 2000 independent tribes within the central area from coast to coast.

All of them (except the cliff-dwellers of the Southwest) lived mainly by hunting, being virtually nomads within limited areas. Their nomad life led to frequent breaking-up into smaller units, forced to seek other areas for securing their subsistence. The tribe-village was ruled usually by a council of elders; one of whom might be looked up to as a leader or chief. But they had no tendency to political cohesion; an occasional small confederacy, formed for aggression or defence, was of brief duration. They lived in a state of constant quarrel and feud with each other; and (as with the ancient Kelts) the most successful leader in raids was the greatest hero.

They had many admirable qualities of character; but their perpetual feuds, their nomadic habits, and their lack of invention, prevented their intellectual growth. They had no mechanical talent, and they had invented few tools. They built no cities. They developed no form of writing.

They were deeply religious; and they were truly eloquent with the spoken word. These two qualities affected remarkably their ceremonial observances in social and juristic practices. But, at the time when their country was reached by the European intruders, they had long been in a static condition of arrested development. They still observed (for the most part) the principle of collective clan or family responsibility and the principle of the blood feud. They were making no advances in most of the elements of organized political life.

However, though these traits obtained generally, there were of course great local varieties in the stages of intellectual attainment, and in the methods of justice, from highest to lowest,—from the primitive revenge feud of the northern Kwakiutl to the three-court system of the Sioux,—from the song-duel of the Eskimos to the nine symbolic gifts of the Hurons and the peace-pipe of the Algonkins.

The following selections illustrate some typical varieties of trial-methods.]

## 89. Settlement of a Blood-Feud among the Hurons.<sup>1</sup>

### *The Nine Symbolic Gifts that Placate Vengeance.*

[Father Brébeuf, a member of the Jesuit Mission, as a part of his Report for the year 1636, is describing some of the "beliefs, manners, and customs of the Hurons". The Huron tribe (their Indian name was Wyandot) were a branch of the Iroquoian linguistic stock, living at first along Georgian Bay of Lake Huron, but later along the south and the west shores of Lake Erie.]

I do not claim here to put our savages on a level with the Chinese, Japanese, and other nations perfectly civilized; but only to put them above the condition of beasts, to which the opinion of some has reduced them, to give them rank among men, and to show that even among them there is some sort of political and civil life. It is, in my opinion, a great deal to say that they live assembled in villages, with sometimes as many as fifty, sixty and one hundred cabins,—that is, three hundred and four hundred households; that they cultivate the fields, from which they obtain sufficient for their support during the year; and that they maintain peace and friendship with one another. I certainly believe that there is not, perhaps, under heaven a nation more praiseworthy in this respect than the Nation of the Bear. . . .

The councils, too, held almost every day in the villages, and on almost all matters, improve their capacity for talking; and, although it is the old men who have control there, and upon whose judgment depend the decisions made, yet every one who wishes may be present, and has the right to express his opinion. Let it be added, also, that the propriety, the courtesy, and the civility which are, as it were, the flower and charm of ordinary human conversation are to some extent observed among these peoples. . . .

1. From "Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791", ed. *Reuben Gold Thwaites*, 1897, vol. X, p. 211; Father *Brébeuf's* Report for 1636, to his superior Father Le Jeune, on the mission to the Hurons, part II, chap. VI.

A more elaborate and even more impressive account of this practice of the Hurons is given by the Italian Father Francesco Giuseppe *Bressani*, in 1648, in his "Brief Account of Certain Missions", etc., "Jesuit Relations", etc., 1899, vol. XXXVIII, chap. VI, p. 273.



If laws are like the governing wheel regulating communities,—or to be more exact, are the soul of commonwealths,—it seems to me that, in view of the perfect understanding that reigns among them, I am right in maintaining that they are not without laws. They punish murderers, thieves, traitors, and sorcerers; and, in regard to murderers, although they do not preserve the severity of their ancestors towards them, nevertheless the little disorder there is among them in this respect makes me conclude that their procedure is scarcely less efficacious than is the punishment of death elsewhere. For the relatives of the deceased pursue not only him who has committed the murder, but address themselves to the whole village, which must give satisfaction for it, and furnish, as soon as possible, for this purpose as many as sixty presents, the least of which must be of the value of a new beaver robe. The Captain presents them in person, and makes a long harangue at each present that he offers, so that entire days sometimes pass in this ceremony.

There are two sorts of presents; some, like the first nine, which they call *andaonhaan*, are put into the hands of the relatives to make peace, and to take away from their hearts all bitterness and desire for vengeance that they might have against the person of the murderer. The others are put on a pole, which is raised above the head of the murderer, and are called *andaerraahaan*, that is to say, "what is hung upon a pole." Now each of these presents has its particular name. Here are those of the first nine, which are the most important, and sometimes each one of them consists of a thousand porcelain beads:

The Captain, speaking, and raising his voice at the name of the guilty person, and holding in his hand the first present as if the hatchet were still in the death wound, *condayee onsa hachoutawas*, "There," says he, "is something by which he withdraws the hatchet from the wound, and makes it fall from the hands of him who would wish to avenge this injury." At the second present, *condayee oscotaweanon*, "There is something with which he wipes away the blood from the wound in the head." By these two presents he signifies his regret for having killed him, and that he would be quite ready to restore him to life, if it were possible.

Yet, as if the blow had rebounded on their native land, and as if it had received the greater wounds, he adds the third present, saying, *condayee onsa hondechari*, "This is to restore the country;" *condayee onsa hondwaronti, etotonhwentisai*, "This is to put a stone upon the opening and the division of the ground that was made by this murder." (Metaphor is largely in use among these peoples; unless you accustom yourself to it, you will understand nothing in their councils, where they speak almost entirely in metaphors.) They claim by this present to reunite all hearts and wills, and even entire villages, which have become estranged. For it is not here as it is in France and elsewhere, where the public and a whole city do not generally espouse the quarrel of an individual. Here you cannot insult any one of them without the whole country resenting it, and taking up the quarrel against you, and even against an entire village. Hence arise wars; and it is a more than sufficient reason for taking arms against some village if it refuse to make satisfaction by the presents ordained for him who may have killed one of your friends.

The fifth present is made to smooth the roads and to clear away the brushwood; *condayee onsa hannonkiaï*, that is to say, in order that one may go henceforth in perfect security over the roads, and from village to village. The four others are addressed immediately to the relatives, to console them in their affliction and to wipe away their tears, *condayee onsa hoheronti*, "Behold," says he, "here is something for him to smoke," speaking of his father or his mother, or of the one who would avenge his death. (They believe that there is nothing so suitable as tobacco to appease the passions; that is why they never attend a council without a pipe or calumet in their mouths. The smoke, they say, gives them intelligence, and enables them to see clearly through the most intricate matters.) Also, following this present, they make another to restore completely the mind of the offended person, *condayee onsa hondion-roenkhra*. The eighth is to give a drink to the mother of the deceased, and to heal her as being seriously sick on account of the death of her son, *condayee onsa aweannoncwa d'ocweton*. Finally,

the ninth is, as it were, to place and stretch a mat for her, on which she may rest herself and sleep during the time of her mourning, *condayee onsa hohiendaen*.

These are the principal presents,—the others are, as it were, an increase of consolation, and represent all the things that the dead man would use during life. One will be called his robe, another his belt, another his canoe, another his paddle, his net, his bow, his arrows, and so on. After this, the relatives of the deceased regard themselves as perfectly satisfied.

Formerly, the parties did not come to terms so easily, and at so little expense; for, besides that the public paid all these presents, the guilty person was obliged to endure an indignity and punishment that some will perhaps consider almost as insupportable as death itself. The dead body was stretched upon a scaffold, and the murderer was compelled to remain lying under it and to receive upon himself all the putrid matter which exuded from the corpse; they put beside him a dish of food, which was soon filled with the filth and corrupt blood which little by little fell into it; and merely to get the dish pushed back ever so little would cost him a present of seven hundred porcelain beads, which they called *hassaendista*; as long as the relatives of the deceased pleased, and even after that, to escape it he had to make a rich present called *akhiataendista*.

If however, the relatives of the dead man avenged themselves for this injury by the death of him who gave the blow, all the punishment fell on *them*; it was their part also to make presents to those even who were the first murderers, without the latter being obliged to give any satisfaction,—to show how detestable they regard vengeance; since the blackest crimes, such as murder, appear as nothing in comparison with it, as it does away with them and attracts to itself all the punishment that they merit.

So much for murder.

## 90. Settlement of a Blood-Feud in the Manistee Tribe; A.D. 1819.<sup>1</sup>

### *A Young Indian Brave returns Voluntarily to his Death.*

[The narrator was a native of Vermont, born in 1802, of distinguished Colonial ancestry. When still a boy, he entered the employ of the (Astor) American Fur Company, at their headquarters in Mackinac Island, and became an experienced fur-trader, familiar with the Indian tribes of the Michigan and Illinois regions. The tragic episode here described by him took place, in May, 1819, during a trading trip along the shores of Lake Michigan.]

We progressed leisurely to the mouth of the St. Joseph River, where we encamped for several days, and were joined by the traders from that river. We reached Grand River early in May, and sought a good camping place up the river, some distance from the Indian camps. The "Feast of the Dead" had commenced, and many Indians had already arrived, and for five or six days we were witnesses to their strange yet solemn ceremonies.

One evening, at the close of the feast, we were informed that an Indian, who the fall previous, in a drunken quarrel, had killed one of the sons of a chief of the Manistee band, would on the morrow deliver himself up to suffer the penalty of his crime according to the Indian custom. We gave but little credence to the rumor, though the Indians seemed much excited over it. On the following day, however, the rumor proved true, and I witnessed the grandest and most thrilling incident of my life.

The murderer was a Canadian Indian, and had no blood relatives among the Manistees, but had by invitation, returned with some of the tribe from Malden, where they received their annuities from the English Government, and falling in love with a Manistee maiden, had married her and settled among them, agreeing to become one of their tribe. As was customary, all his earnings from hunting and trapping belonged to his father-in-law until the birth of his first child, after which he commanded his time and

1. From *Gurdon Saltonstall Hubbard*, "Autobiography", ed. *Caroline M. McIlwaine*, Lakeside Press, R. R. Donnelley & Sons Co., Chicago, 1940, p. 67.

could use his gains for the benefit of his family. At the time of the killing of the chief's son he had several children and was very poor, possessing nothing but his meagre wearing apparel and a few traps. He was a fair hunter, but more proficient as a trapper.

Knowing that his life would be taken unless he could ransom it with furs and articles of value, after consulting with his wife, he determined to depart at night in a canoe with his family and secretly make his way to the marshes at the headwaters of the Muskegon River, where he had before trapped successfully, and there endeavor to catch beaver, mink, marten, and other fine furs, which were usually abundant, and return in the spring and satisfy the demands of the chief.

As, according to the custom, he failed to satisfy the chief and family of the murdered man, either by ransom or a sacrifice of his own life, they could demand of his wife's brothers what he had failed to give, he consulted with one of them and told him of his purpose, and designated a particular location on the Muskegon where he could be found if it became necessary for him to return and deliver himself up. Having completed his arrangements, he made his escape and arrived safely at the place of destination, and having but few traps and but a small supply of ammunition, he arranged dead-fall traps in a circuit around his camp, hoping with them and his few traps to have a successful winter, and by spring to secure enough to save his life.

After the burial of his son, the chief took counsel with his sons as to what they should do to revenge the dead, and as they knew the murderer was too poor to pay their demands, they determined upon his death, and set about finding him. Being disappointed in this, they made a demand upon the brothers of his wife, who, knowing that they could not satisfy his claims, counselled together as to what course to pursue, all but one of them believing he had fled to Canada.

The younger brother, knowing his whereabouts, sent word to the chief that he would go in search of the murderer, and if he failed to produce him would himself give his own life in his stead. This being acceptable, without divulging the secret of his brother-in-

law's hiding place, he started to find him. It was a long and difficult journey, as he had no landmarks to go by and only knew that he should find his brother-in-law on the headwaters of the Muskegon, which he finally did.

The winter had been one of unusually deep snow, and the spring one of great floods, which had inundated the country where he was. The bears had kept in their dens, and for some reason the marten, beavers, and mink had not been found; so that when their brother-in-law reached them he and his family were almost perishing from starvation, and his winter's hunt had proved unsuccessful. They accordingly descended together to the main river, where the brother left them for his return home, it being agreed between them that the murderer would himself report at the mouth of Grand River during the "Feast of the Dead," which promise he faithfully performed.

Soon after sunrise the news spread through the camp that he was coming. The chief hastily selected a spot in a valley between the sand-hills, in which he placed himself and family in readiness to receive him, while we traders, together with the Indians, sought the surrounding sand-hills, that we might have a good opportunity to witness all that should occur. Presently we heard the monotonous thump of the Indian drum, and soon thereafter the mournful voice of the Indian, chanting his own death song,—and then we beheld him, marching with his wife and children, slowly and in single file, to the place selected for his execution, still singing and beating the drum.

When he reached a spot near where sat the chief, he placed the drum on the ground, and his wife and children seated themselves on mats which had been prepared for them. He then addressed the chief, saying: "I, in a drunken moment, stabbed your son, being provoked to it by his accusing me of being a coward and calling me an old woman. I fled to the marshes at the head of the Muskegon, hoping that the Great Spirit would favor me in the hunt, so that I could pay you for your lost son. I was not successful. Here is the knife with which I killed your son; by it I wish to die. Save my wife and children. I am done." The chief received the knife,

and, handing it to his oldest son, said, "Kill him!" The son advanced, and, placing his left hand upon the shoulder of his victim, made two or three feints with the knife and then plunged it into his breast to the handle and immediately withdrew it.

Not a murmur was heard from the Indian or his wife and children. Not a word was spoken by those assembled to witness. All nature was silent, broken only by the singing of the birds. Every eye was turned upon the victim, who stood motionless with his eyes firmly fixed upon his executioner, and calmly received the blow without the appearance of the slightest tremor. For a few moments he stood erect, the blood gushing from the wound at every pulsation; then his knees began to quake; his eyes and face assumed an expression of death, and he sank upon the sand.

During all this time the wife and children sat perfectly perfectly motionless, gazing upon the husband and father. Not a sigh or a murmur escaping their lips until life was extinct, when they threw themselves upon his dead body, lying in a pool of blood, in grief and lamentations, bringing tears to the eyes of the traders, and causing a murmur of sympathy to run through the multitude of Indians.

Turning to Mr. Deschamps, down whose cheeks the tears were trickling, I said: "Why did you not save that noble Indian? A few blankets and shirts, and a little cloth, would have done it." "Oh, my boy," he replied "we should have done it. It was wrong and thoughtless in us. What a scene we have witnessed!"

Still the widowed wife and her children were clinging to the dead body in useless tears and grief. The chief and his family sat motionless for fifteen or twenty minutes, evidently regretting what had been done. Then he arose, approached the body, and in a trembling voice said: "Woman, stop weeping! Your husband was a brave man, and like a brave, was not afraid to die as the rules of our Nation demanded. We adopt you and your children in the place of my son; our lodges are open to you; live with any of us; we will treat you like our own sons and daughters; you shall have

our protection and love." "Che-qui-ock" (that is right) was heard from the assembled Indians, and the tragedy was ended.

That scene is indelibly stamped on my mind, never to be forgotten.

# 91. A Homicide Trial in the Pah-Ute Tribe in California, A.D. 1853.<sup>1</sup>

## *Burning Alive as the Penalty.*

[The narrator, as a youth of 18 years, went overland to California in 1850, and spent some three years there as a gold miner.

At the time of this narrative he was mining at Dutch Flat, near what is now Placerville, and the Indian tribe had its location nearby at the so-called Columbia Village. The Pah-Utes (sometimes dubbed the "Diggers", from their mode of agriculture) had a well-organized system of government, as the narrator elsewhere describes in his book.]

About this time Tchubo, the son of Capitan Juan of the Columbia ranch, came and wanted to work for me. He was about sixteen years old, stout, and remarkably bright. I was glad to have him with me and I felt safer, especially at night; and as he did fair work I paid him at the rate of five dollars a day. . . .

Soon he was neatly dressed, as he said, "Como un Americano" (like an American). Besides his native Indian, he had considerable knowledge of Spanish, and made wonderful progress in learning the English language . . . and insisted on being called by the English name, Tom. His father often visited us and seemed much pleased that his son could talk English and was learning to read and write. I became greatly interested in Tom. His older brother had been killed in battle with the Placerville Indians, and I thought when he took his father's place as chief he would introduce educational methods. . . .

1. From Rev. John Steele, "In Camp and Cabin: Mining Life and Adventure in California in 1850 and later"; first printed 1901; reprinted, ed. Milo Milton Quaipe, 1928, Chicago, Lakeside Press, R. R. Donnelley & Sons Co., p. 293.

One morning, a week after this, I sent him with a note, as I had often done, to Mr. Cooledge of Peru for groceries. It was afternoon when he returned, drunk and without the groceries. When questioned, he said they were at Wallingford's [a liquor-saloon]. . . . The next Saturday afternoon Capitan Juan made us a visit. After supper I paid Tom his earnings, \$15, and saying he would return Monday morning they started for home. Knowing that Capitan Juan never drank, I was glad they were together, feeling that his son was safe with him. . . . On the way to Peru for provisions, passing Wallingford's saloon, he came out and invited them in; Capitan Juan refused to enter, and then Wallingford gave Tom a small bottle of some kind of liquor. His father took it, smelled of it, and at once dashed it in pieces against a rock.

The next day Tom and two other Indians came back to the saloon, engaged in gambling, and all drank freely of what Tom called "vino" (wine); and when all their gold was gone, started for the village. The two Indians quarreled, one stabbing the other with a knife. Tom tried to help the wounded Indian home, but he died on the way. And then Tom, afraid of his father's anger, should he appear before him drunk, came to me. Afterward I learned that the one who committed the deed told of it in the village, and the friends went out, brought in the body, and prepared for the funeral.

With Tom I attended the funeral of the murdered man. Entering the village, we passed a man sitting alone at the door of a wigwam.

"That's the man," said Tom. "He killed him, and must die."

"Why don't he go away?" I inquired.

"Because if they not find him, they take his father, his brother, his son; somebody die—you see." Afterward, upon inquiry, I found that this was a kind of common law among these Indians. When murder was committed, the murderer must be put to death. If he ran away, the nearest of his male kindred whom they could find must die in his stead within a year. . . .

The funeral was inexpressibly sad; every countenance and voice indicated genuine sorrow. The body was burned with the usual ceremonies, and after they were concluded, twelve warriors with

bows and arrows slung over the left shoulder, and each with a long flint-pointed spear in the right hand, in charge of two officers, came suddenly upon the scene. Marching with them, unbound, was the man who had killed his companion. Passing to the front of the chief's wigwam, they halted, and their prisoner was seated on the ground. Capitan Juan came out, and after talking awhile in Indian also sat down.

Then followed something like a trial, conducted by one of the officers. Tom was called and questioned; others came forward and spoke. It seemed as though the entire village, with a number of whites, were present. The guards kept a large space open so that the chief, officers, prisoner, and witnesses could be seen.

Again the chief arose, and with great earnestness and solemnity spoke at length. The Indians were deeply affected by his talk; and how I did regret that I did not understand it. When the speech was ended, two men approached with cords of some kind of bark and bound the prisoner's hands together at the wrists; another cord around the elbows was tied across the back, and the limbs were bound firmly together at the ankles and knees. He made no resistance, and I am not aware that he spoke during the operation.

Then a blanket was thrown over his head, and a cord placed below his knees and over the back of his neck, drawing his head and knees together, and so, with the blanket bound closely around him, he was carried outside the village, where a funeral pile of dry wood had been built and already fired, and he was laid thereon.

Sick at heart, I turned away from the awful scene.

## 92. Settlement of a Blood-Feud among the Algonkins in Wisconsin.<sup>1</sup>

### *The Ceremony of the Pipe of Peace.*

The Menomoni Indians are a small tribe of the Algonkin Indians who dwell in Wisconsin. The tribal chief, Sakanahowäo, is

1. From *Alan Skinner*, "Social Life and Ceremonial Bundles of the Menomoni Indians", *Anthropological Papers of the American Museum of Natural History*, 1913, vol. XIII, part 1, as summarized by *J. H. Landmann*, "Primitive Law, Evolution and Sir Henry Maine", *Michigan L.Rev.* 1930, vol. XXVIII, p. 412.

the fountain of justice. One of his chief duties is the prevention of internecine brawls, especially those occasioned by murder. Yet, reciprocal killing is much in evidence.

More often, the murderer collects gifts, including a pony, as a blood offering to the family of the victim. In the meanwhile, the Sakanahowäo is informed to fetch his peace pipe and other regalia. Then the defendant as a semi-prisoner with his gifts, his entire family, the Sakanahowäo with his regalia and attendants, take to the lodge of the deceased, where the aggrieved party is already in waiting with their Nänäwetau or warrior chief as their representative. The deceased's family sits in a row along the side of the wigwam farthest from the door. The father of the dead man, his nephews or uncles sit at the head of the line, the four nearest relatives a little apart from the rest. When the party of the offender arrives, some may sit inside the lodge if there is room, otherwise they squat outside before the wigwan, which is the more usual situation. The murderer, nude, with his face painted black, stands in the center of the lodge. The brother of the murderer stands beside him.

The Sakanahowäo and his attendants come directly in and place the presents, with the pony's bridle conspicuously displayed, in the center of the floor. The peace pipe is laid on top of the heap of gifts. Then the war chieftain, or uncle, or helper of the pipe-bearer, steps forward, fills the pipe and lights it with a flint and steel. If the first spark he strikes ignites the punk, the omen is auspicious for the pleaders; if not, trouble is foreseen. All eyes are riveted on the performance of this ritual. When it is lighted, the punk is placed in the bowl of the pipe on the tobacco. He then swings the stem of the pipe through the air with a circular motion, allowing the fire to take hold of itself. He then hands it to the Sakanahowäo, who turns to his clients and addresses them as follows:

"Now, my relatives, we all know what we have done; we have murdered, and we have come here with the pipe of peace to ask the injured party to accept it according to the old rule. This is our ancient practice, and so we pursue it to see if we can make friend-

ship between us again and prevent further bloodshed. Now I am going to begin."

His clients ejaculate "Eh" in approval, and then the Sakanahowäo reverses the pipe and carrying it over his arm offers the mouthpiece to the father or closest relative of the dead man, afterwards passing it from east to west, following the sun's course. If the man accepts it, he, weeping as a sign of sorrowful acquiescence, takes the pipe.

The pipe-bearer then takes the badge of his authority and places it on the acceptor's neck, with a speech of congratulation and condolence. The pipe-holder then addresses himself to the murderer, informing him that his crime has been pardoned by means of the badge, and that he and the relatives of his victim are now friends.

The relative wears the badge four days, at the end of which time the servant of the pipe-holder procures it and returns it to his master. Then he washes the black from the murderer's face and frees him, with advice. The relative now has control over the murderer's soul, should he die, and can have it to care for his soul on the death journey.

The afflicted family head may reject the peace pipe by turning his head away, which action would be imitated by all the members of his family. In the event of a refusal, the Sakanahowäo sitting in the center of the lodge, with his back toward the opposite side, says to his clients:

"You see what has happened. They have refused the pipe! Our overtures are not accepted. That is too bad."

He lays the pipe across the gifts once more.

"What shall we do now to make this good?" asks the Sakanahowäo of the Nänäwetau of the plaintiff.

The two engage in a heated controversy as to where the guilt lies. Then the Sakanahowäo, representing the aggrieved party, makes a speech:

"Now my people, this is justice, this is right. We will not demand the life of the murderer; he is justified. We find the quarrel

was started by our friend. He had a bad record anyway. Let us agree without further bloodshed."

If he persuades them, the peace maker washes the charcoal from the culprit's face and the incident is closed.

Sometimes the murderer is adjudged guilty nevertheless. Witnesses and other individuals are called to testify. If he is pronounced guilty, he is slain immediately by the uncle or nephew of the victim, and the crime is expiated.

93. **A Blood-Feud Settlement among the Kwakiutl Tribe of British Columbia.<sup>1</sup>**

*The Disgrace of Hiring a Substitute to take Revenge.*

[The Kwakiutl Tribe, once a powerful group but now almost extinct, lived on the Pacific Coast, in the vicinity of Fort Rupert on Vancouver Island. Its legends and traditions were recorded by a skilled ethnologist, from the lips of members of the tribe, by question and answer speaking in their native language. The record was then printed in that language, with a translation.

Following is their account of their procedure in dealing with a blood-feud:]

Now I will answer what has been asked by you, when you wrote to me on the 25th of December. It is difficult what you refer to that I am to answer, for, indeed, the new Kwakiutl speaking people have changed the ways in which they are doing things from the ways of the early Indians.

1. From *Franz Boas*, "Ethnology of the Kwakiutl", 35th Annual Report of the Bureau of American Ethnology, 1913-14, Part 2, p. 1359; based on data collected by *George Hunt*.

In this extract, the word "clan" has been substituted for the native word "numaym", to make clearer reading; the term "clan" having such fluctuating social connotations, the ethnologist, doubtless for accuracy's sake, avoided using it; but here it serves well enough.

Also, the proper names of the original have here been replaced by abbreviations; for the reader would only be obstructed, in following the story, by such strange combinations as "Lakolelase", "Gweyendze", "Denaxdax".

For the early Indians had no courthouse, they had no judges, and they had no witnesses. If one who belongs to another clan kills even a common man belonging to another clan, then after a short time they have a meeting.

Let me say, for example, that there was Yaq, chief of the clan Gex of the Qom. Meled killed him, and Meled belonged to the clan Yoex of the Qom. Yaq had for his mother Gwek. Nobody knew where Meled had gone.

Then it occurred to Gwek to invite the Gex, the clan of her dead son, and as soon as the whole clan Gex had come in, Gwek spoke and said, "Come, clan Gex, you who have no chief, for your head has been taken off, Gex, and your clan is disgraced by the clan Yaex, and the disgrace will not be ended for the coming generations of the Gex. Now, is it well in your minds that you do not kill in return, that the other one may die who killed your chief?" Thus she said to the clan Gex.

Then Chief Gwey,—for he was the second chief after Yaq in the clan Gex—spoke and said: "Listen to the word of my aunt, about what has been done to our head chief Yaq. Now we are disgraced, for we have disgraced the future generations of the clan Gex. Now all of you act, you, clan Gex. I mean all you warriors and young men. You shall hide (under your clothing) knives and stab Meled as soon as you see him, that we may wash off with blood the disgrace which he brought on us; and if you do not see him, then kill his elder brother Lal.

Thus he said. After he had finished his speech, they went out of the house of Yaq, and from that time on, the Gex all kept their knives ready and hid small axes. Meled always kept the door of his house bolted.

Now they knew that Yaq had been killed, and all the tribes knew that he had been killed by Meled. Then the chiefs of the tribes all pitied [the mother] Gwek, and therefore the warriors of the tribes watched for Meled, to kill him when they should see him.

However, he was seen at Dzawade, and immediately Gwa shot him. Then Meled was dead. Gwa was a warrior of the Qam, a

clan of the Dax. Then [the mother] Gwek paid Gwa a slave for shooting Meled.

It was wrong what was done by Gwek, when she paid a slave to Gwa, when he had shot Meled; and it is a disgrace to the clan Gex, for the one who shot Meled did not belong to the clan Gex. The clan Gex was beaten [in the duty of killing] by the clan Yaex, and it is a disgrace to the name of the clan Gex, after that.

Now if Meled had paid a copper, or if he had paid his daughter to marry the elder brother of the one whom he had shot, then the clan Yaex would have been disgraced, because he paid in order not to be killed in return and so as not to die also.

Therefore, when a man kills his fellowman, he does not often pay for it, for he thinks that when he gets a child, the child will be disgraced, if he had paid off in order not to be killed, and only those pay off who are weak minded.

If another man of the clan Gex had killed Meled, then there would be no disgrace to the clan Gex, and all the men would have stopped talking about it, because only Meled of the clan Yaex would have died.

Meled was a common man, and Yaq was the head chief of the clan Gex, and they paid a slave to Gwa for shooting Meled; so there were two [lost], Yaq and a slave out of the clan Gex, and therefore the clan Gex was disgraced.

#### 94. Trial Procedure among the Eskimos.<sup>1</sup>

##### *The Song-Duel in Greenland as a Method of Settling Disputes.*

[The narrator, a member of the American Anthropological Society, and of the Faculty of New York University, has had a wide experience in field-work among the Indian tribes of the Northwest, and is the author of other memoirs on the "law-ways" of the native tribes.

1. From *E. Adamson Hoebel*, "Law-Ways of the Primitive Eskimos", *Journal of Criminal Law and Criminology*, 1941, vol. XXXI, No. 6, p. 663

The footnotes of the author, giving citations of authorities, have here been omitted.

After describing the social organization of the Eskimo tribes (which are distributed all along the coasts of Alaska, northern Canada, Greenland, and the north Atlantic), and their attitudes to property, leadership, homicide, and other crimes, he comes to the subject of procedure:]

*Evidence.* In the small Eskimo community the question of evidence in disputes does not raise a great problem; sufficient direct information seems usually to be at hand. When the fact is not known, however, resort may be had to divination, but apparently only when an element of sin enters into the offense, or as among the Copper Eskimo, at least, when a death through sorcery has occurred. Divination is by weighing. A thong is looped around the head of a reclining person, or a bundled coat, or even the diviner's own foot. When the proper spirit has entered the object, the questions may be put. As it is hard or easy to lift, the answer is "yes" or "no".

*Regulated Combat.* Homicidal dispute, though prevalent, is made less frequent in many Eskimo groups by recourse to regulated combat—wrestling, buffeting, and butting. Buffeting is found among the central tribes along the Arctic circle from Hudson Bay to Bering Straits. Wrestling occurs in Siberia, Alaska, Baffin Land and Northwest Greenland. Head-butting as a feature of the song duel occurs in West and East Greenland. All three forms are a type of wager by battle.

In buffeting, the opponents face each other, alternately delivering straight-armed blows on the side of the head, until one is felled and thereby vanquished. Butting accompanies the singing in the song duel in Greenland. The singer, if so inclined, butts his opponent with his forehead while delivering his exculpation. The opponent moves his head forward to meet the blow. He who is upset is derided by the onlookers and comes out badly in the singing. As juridical forms, boxing and butting are more regulated than feudistic homicide, since the contests are announced and occur on festive occasions when they are looked upon as a sort of sport performance before the assembled community. Stealth, cunning and ambush are not part of such contests; the strongest wins by pitted



strength. The object of the boxing and butting contests is not annihilation, but subjection. Nor is there any concern with basic justice. Whatever the facts underlying the dispute, they are irrelevant to the outcome. The man who wins, wins social esteem. He who loses, suffers in social ranking. That is all.

Boxing and butting are apparently available as means of settling any disputes except homicide.

Wrestling serves much the same function, though it may have a more deadly outcome in Baffin Land and Labrador, where the loser may be slain by the victor. The wrestling duel is occasionally used as the means through which blood revenge may be carried out. It is more sporting, however, for Boas tells us that if the murderer wins, he may slay yet another of his victim's kinsmen.

*Song duels* are used to work off grudges and disputes of all orders, save murder. An East Greenlander, however, may seek his satisfaction for the murder of a relative, if he is too physically weak to gain his end, or if he is so skilled in singing as to feel certain of victory. Since East Greenlanders get so engrossed in the mere artistry of the singing as to forget the cause of the grudge, this is understandable. There, singing prowess equals or outranks the gross physical.

The singing style is highly conventionalized. The successful singer uses the traditional patterns of composition which he attempts to deliver with such finesse as to delight the audience to enthusiastic applause. He who is most heartily applauded is "winner". To win a song contest brings no restitution in its train. The sole advantage is in prestige.

Among the East Greenlanders song duels may be carried on for years, just for the fun of it. But elsewhere, grudge contests are usually finished in a single season. Traditional songs are used, but special compositions are created for each occasion to ridicule the opponent and capitalize his vulnerable foibles and frailties.

Some situations and their songs will illustrate the institution as it functions:

Ipa... took Igsia....'s third wife away from him. Igsia... challenged Ipa.... to a song contest. Because he was not really

competent, Ipa... had his former step-son, M.... sing for him. M.... accused Igsia... of attempted murder. When Igsia...'s turn came to sing he replied with proper ridicule and satirical antics as follows:

"I cannot help my opponent not being able to sing or bring forth his voice. (He put a block of wood in his opponent's mouth and pretended to sew the mouth shut.)

"What shall we do with my opponent? He can neither sing anything, nor bring forth his voice. Since one cannot hear him, I had better stretch out his mouth and try to make it larger. (He stretched his opponent's mouth to the sides with his fingers, crammed it full of blubber, then gagged it with a stick.)

"My opponent has much to say against me. He says I wanted to do A.... a hurt and would have slain him. When we came hither from the south, it was thou didst first challenge A.... to a drum match." (He put a thong in his opponent's mouth and tied it up under the rafters.)

Etc., etc., etc., The song lasted one hour. Whenever Igsia... made mockery of his opponent with such tricks, M.... showed his indifference by encouraging the audience to shout and laugh at him.

Other songs rely less on buffoonery, placing greater reliance on innuendo and deprecation. When K.... and E.... confronted each other they sang with dancing and mimicry in the following manner (E.... had married the divorced wife of old man K.... Now that she was gone, K.... wanted her back. E..... would not give her up, and a song duel occurred):

K.....:

"Now shall I split off words—little, sharp words  
Like the wooden splinters which I hack off with my ax.  
A song from ancient times—a breath of the ancestors  
A song of longing—for my wife.  
An impudent, black skinned oaf has stolen her,  
Has tried to belittle her.  
A miserable wretch who loves human flesh—  
A cannibal from famine days."

E. . . . ., in his defense, replied:

"Insolence that takes the breath away  
Such laughable arrogance and effrontery.  
What a satirical song! Supposed to place blame on me.  
You would drive fear into my heart!  
I who care not about death.  
Hi! You sing about my woman who was your wench.  
You weren't so loving then—she was much alone.  
You forgot to prize her in song, in stout, contest songs.  
Now she is mine  
And never shall she visit singing, false lovers.  
Betrayers of women in strange households."

. . . . In West Greenland, the singer has the vocal backing of his household. In preparing for the contest he sings his songs until all his household knows them perfectly. When the actual contest is in full swing, his householders reinforce his words in chorus. In spite of the nastiness of the insults hurled, it is good form for neither party to show no anger or passion. And it is expected that the participants will remain the best of friends thereafter. The West Greenlanders, in contrast to the men of the East Coast, use self-deprecation, "the self-irony which is so significant in the Eskimo character," though at the same time the opponent is lashed with weighty accusations and sneering references. . . .

Among the Iglulik Eskimos, north of Hudson Bay, contest singing is also an important art. Among these people, anyone who would be considered an effective singer must have a "song cousin." This is an institution built upon the basis of "formal friendship," a comradeship bond which was wide-spread among the aborigines of the western hemisphere. Song-cousins try to out-do each other in all things, exchanging costly gifts and their wives whenever they meet. Each delights to compete with the other in the beauty of his songs as such, or in the skilful composition and delivery of metrical abuse. When song cousins expose each other, it is for fun, and is done in a light-hearted, humorous manner. When a man takes up a grudge song-duel, however, the tenor of the songs is different. Though the cast of the songs is humorous, for effect, insolence, de-

risation, and the pictured ludicrousness of the opponent are the stuff they are made of. As in Greenland, the one who can win the audience, or silence his opponent, is victor; but in any event, winner and loser are expected to be reconciled, and they exchange presents as a token of settlement.

Further inland, among the Caribou Eskimo, who are located at the very center of the whole Eskimo territory, the song duel is also found . . . . . The occurrence of the song duel complex all down the west coast of Alaska and even out into the Aleutian Islands (reported by the Russian missionary Weniainow) show how basic (and possibly, ancient) a form it is among the Eskimo.

The song duels are juridical instruments insofar as they do serve to settle disputes and restore normal relations between estranged members of the community, and insofar as one of the contestants receives a "judgment" in his favor. But, like the medieval wager of battle, the judgment bears no relation to the rightness or wrongness of the original actions which give rise to the dispute. There is no attempt to mete justice according to rights and privileges defined by a substantive law. It is sufficient that the litigants (contestants) feel relieved—the complaint laid to rest—a psychological satisfaction attained; this is justice sufficient unto the needs of Eskimo society as the Eskimos conceive it.

Unlike wager of battle, however, there is no ordeal element in the song duel. Supernatural forces do not operate to enhance the prowess of the singer who has "right" on his side. Let it be remembered that "right" is immaterial to the singing or its outcome (though the singer who can pile up scurrilous accusations of more or less truth against his opponent has an advantage in the fact). As the court-room joust may become a sporting game between sparring attorneys-at-law, so the juridical song contest is, above all things, a contest in which pleasurable delight is richly served, so richly that the dispute-settlement function is nearly forgotten. And in the forgetting the original end is the better served.

95. Trial Methods among the Sioux Tribes.<sup>1</sup>*Three Regular Courts,—Civil, Military, Hunting.*

[The narrator is a member of the South Dakota Bar Association, living at Pierre. The description here given is based partly on personal observation, partly on extensive inquiries among Sioux tribal chiefs, Government agents of the Indian Office, missionaries, and various old records.]

Primarily the Sioux government was by clans,—patriarchal; but within the clan it very nearly approached the representative republican form. The council was the representative body which gave expression to the will of the people. True, the council was selected by the chief of the clan; but his very tenure of office depended upon his using the nicest discretion in inviting into his cabinet the men of character, valor and influence, so that the body was almost invariably entirely representative of popular views and interests.

Caste cut a considerable figure; indeed it has been said by those most intimate with Sioux life that there is as much caste among the Dakotas as among the Hindus. Only high caste men of course would be permitted to sit in the deliberations. When a council was to be convened, the ordinary practice was for the chief's crier to go out and announce to the camp that a matter was to be considered in council, and the head men at once assembled and seated themselves in the council circle as a matter of course and of right. The chief, unquestionably a man of courage and physical power, was an executive officer who rarely asserted arbitrary rule, particularly in civil affairs, for the Sioux were too high spirited a people to tolerate anything savoring of despotism. Usually he was suave, diplomatic and tolerant, and enjoyed the affection and veneration of his people.

Most public affairs were determined in the general council, including many subjects naturally falling within the jurisdiction of courts of justice. But aside from the council were two distinct Courts, one exercising jurisdiction in matters civil and criminal in

1. From *Doane Robinson*, "Sioux Indian Courts", in "Report of the Ninth Annual Meeting of the South Dakota Bar Association", Jan. 20, 1909, p. 108.

times of peace; the other taking the broadest and most comprehensive jurisdiction of all things military, and in time of war assuming jurisdiction in all of the affairs of the people, arbitrarily placing the camp under martial law.

1. The judges of these Civil Courts were usually twelve in number and held their places by hereditary right, though occasionally some low-caste man, through some brilliant exploit would break into this exclusive and aristocratic circle, and sometimes even exercised dominating influence, which the aristocrats dared not oppose, though he was still regarded as a plebeian upstart, and was despised by the upper ten, and his rank died with him. Ordinarily from seven to twelve judges sat for the trial of causes, but sometimes even a greater number were permitted. The Civil Court in time of peace took cognizance of civil and criminal matters arising in the band. Civil actions usually grew out of disputes about the ownership of property, and the Court patiently heard the testimony of the parties and witnesses and at once determined the ownership of the article, delivered it to the successful litigant, and the decision was never reviewed or questioned. A majority of the Court determined the judgment.

Criminal matters of which the Court took cognizance were assaults, rapes, larceny and murder; all crimes against persons; and if committed against a member of the tribe were severely dealt with. Sometimes it was necessary to prove the crime by competent witnesses, and the Court was the judge of the credibility of those who testified. But rarely, however, was it necessary to summon witnesses, for if the accused was really guilty it was a point of honor to admit the offense and take the consequences. Thus the real responsibility resting upon the Court in most cases was to determine the penalty. . . .

2. While the Civil Court was composed of the "elder statesmen", the Military Court was composed of the war chief and his most distinguished braves, and, as has been before suggested herein, exercised unlimited power in time of war and was implicitly obeyed. It took jurisdiction of all matters growing out of infractions of the "Articles of War" and of all the civil and criminal af-

fairs of the tribe as well. There was no appeal from its judgments, and its sentences were summarily executed. . . .

3. A Court very similar to the Military Court was likewise organized for each great hunting expedition and given absolute control of the general movement. But this Hunting Court did not interfere with the ordinary jurisdiction of the Civil Court in matters of personal disputes, personal injuries and the like. In 1841 [former] General Henry H. Sibley, of Minnesota, proposed to the Indians residing about his home at Mendota that they go down to the "Neutral Strip" in Northern Iowa for a long hunt. The Sioux were agreeable, and to get the matter in form Sibley made a feast to which all of the natives were invited. After eating and smoking, several hundred painted sticks were produced and were offered for the acceptance of each grown warrior. It was understood that whoever voluntarily accepted one of these sticks was solemnly bound to be of the hunting party under penalty of punishment by the soldiers if he failed. About one hundred and fifty men accepted. These men then detached themselves from the main body, and after consultation selected ten of the bravest and most influential of the young men to act as members of the Hunting Court. These justices were called "soldiers". Every member bound himself to obey all rules made by the Court. A time was then fixed for the start. At the appointed time and place every one appeared, but one man who lived twelve miles distant. Five of the Court at once started out to round him up. In a few hours they returned with the recalcitrant and his family, and with his belongings packed upon his horses. He was duly penitent and not subjected to punishment, though he was severely threatened in case he again failed.

General Sibley thus tells the story: "We," Sibley and his white friends, "became subject to the control of the soldiers. At the close of each day the limits of the following day's hunt were announced by the soldiers, designated by a stream, grove, or other natural object. This limit was ordinarily about ten miles ahead of the proposed camping place, and the soldiers each morning went forward and stationed themselves along the line to detect and punish any who attempted to pass it. The penalty attached to any violation of

the rules of the camp was discretionary with the soldiers. In aggravated cases they would thresh the offender unmercifully. Sometimes they would cut the clothing of the man or woman entirely to pieces, slit down the lodge with their knives, break kettles, and do other damage. I was made the victim on one occasion by venturing near the prohibited boundary. A 'soldier' hid himself in the long grass until I approached sufficiently near, when he sprang from his concealment and giving the soldiers' whoop rushed upon me. He seized my fine double barreled gun and raised it in the air as if with the intention of dashing it to the ground. I reminded him that guns were not to be broken, because they could be neither repaired or replaced. He handed me back the gun and then snatched my fur cap from my head, ordering me back to camp, where he said he would cut up my lodge in the evening. I had to ride ten miles bareheaded on a cold winter day, but to resist a soldier while in the discharge of duty is considered disgraceful in the extreme. When I reached the lodge, I told Faribault of the predicament in which I was placed. We concluded the best policy would be to prepare a feast to mollify them. We got together all the best things we could muster, and when the 'soldiers' arrived in the evening we went out and invited them to a feast in our lodge. The temptation was too strong to be resisted. They responded, ate their fill, smoked and forgave the 'contempt of court,' which indicates that the judiciary, even in that primitive time, was not wholly incorruptible." . . .

The modern Sioux Courts, organized under the authority of federal law and in accordance with the rules of the Indian Department, are perhaps of more interest to lawyers than the Courts of the primitive tribes. . . . It was not until after the Red Cloud war ended in 1868 that the Courts for Indian offenses, equipped by the Indians, themselves, began to be tried at some of the agencies in a small way. The Sissetons and Santees were first to give them a trial, and eventually they were supplied to all the Reservations (except the Rosebud, which, for some reason of which I have been unable to secure information has never had them).

. . . . .

The Indian people generally have great respect for the judges of their courts, and the latter show much wisdom and discretion in their decisions, though they do not always place the white man's estimate upon the relative enormity of offenses. I was present at a session of the Cheyenne River Court in 1892, when two parties accused with crime were brought before it. One was charged with stealing a picket-pin of the value of thirteen cents and he got thirty days in the guard-house, while the other, convicted of a rape, got ten days.

Formerly the judges were not compensated, but now they receive a nominal salary,—from five to ten dollars per month,—and their board while sitting. It is regarded as a great distinction to be chosen to the bench, and the Courts administer the law, as they understand it, with dignity and firmness. There are no lawyers upon the reservations, but a friend may appear for a party to an action, or one accused of an offense, and the trials are conducted with much formality and the pleas are frequently shrewd and eloquent. Every Indian is an orator by nature, and the Courts afford the best modern opportunities to display their gifts.

The police force upon all of the reservations is composed of the natives, and they are highly efficient and render great assistance to the Courts in preserving the peace and in bringing offenders to justice. It is a point of honor for a Sioux policeman to do his whole duty regardless of obstacle, and neither kin nor friend can expect leniency if he stands in the way of duty. And this is equally true of the Courts; it is not an infrequent thing for the judge to try his son or near relative, and in such cases the accused is sure to get the limit of the law.

Without exception the Indian authorities commend the native Courts and policemen for fidelity and effective administration of justice.

## 96. Trial of a Choctaw Chief for Homicide, A.D. 1940.<sup>1</sup>

*Acquitted by a White Man's Jury, He must yet Stand Trial by his Own Tribe.*

[Sept. 6, 1940]

This morning in Judge Stennis' court, a jury of 12 Noxubee county white farmers brought in a verdict of "not guilty" in the case of Cameron Wesley, charged with the murder of Evein Tubby, both tenant farmers of the remote Southwestern corner of Noxubee county. Both are full-blooded Choctaw Indians.

Cameron Wesley is chief of a "tribe" of six families. Some 500 are all that are left here of some 25,000 Choctaws whose hunting grounds in 1830 were two-thirds of the State of Mississippi. Evein Tubby (also spelled "Tubbee," which means "killer" in Choctaw) was a full-blooded Choctaw Indian, too. Chief Cameron Wesley slew him Sunday, June 16, 1940, at Wesley's home, and claimed self-defense. Choctaw-English interpreters were required for many of the witnesses. The State of Mississippi charged it was deliberate murder, caused by rivalry of the two for the chieftainship of the dwindling tribe, and demanded the death penalty. But the jury believed W. B. Lucas of Macon, defense counsel, when he argued self-defense against "a drunken Indian on the warpath, with hell in his heart and war on his wings."

But within an hour after he heard the "not guilty" verdict with stoic calm traditional to his race, this morning Chief Cameron Wesley called on Judge Stennis in his courthouse office here. He explained that he lived under two laws; American law and Choctaw law. American law said that he could not be placed twice in jeopardy for the same crime. But Choctaw nation law said he must stand trial. Jenny Tubby (or Tubbee), widow of the man he slew, must set the time for the tribal trial, and it must not be later than the second week in September, 1940. Over it would preside Annie Wallace, " 'bout 70 years old, Judge," elected queen of

1. From *Meigs O. Frost*, "Choctaw Chief to Face Tribe", in "The Times-Picayune", New Orleans, La., George W. Healy, Jr., managing editor, as reprinted in "The Macon Beacon", Macon, Miss., Sept. 6 and 20, 1940 (Douglas Ferris, publisher).

the Choctaw tribe some four years ago. Beside her would sit Johnny Cotton, overseer of the tribe, another full-blooded Choctaw.

The tribal trial, Chief Cameron explained, is to be held at the fork of Dancing Rabbit creek, some 15 miles southwest of Macon. There, September 15, 1830, now a hundred years ago, the Choctaw nation "mingoes, chiefs, captains and warriors" met with John H. Eaton and John Coffee, representing the United States of America. There they signed the Dancing Rabbit treaty by which the Choctaws sold to the Americans all their lands east of the Mississippi river, now 25 Mississippi counties. There they agreed to leave for the Indian Territory, now Oklahoma, half of them in 1831, half in 1832. But some stayed by their old hunting grounds. Cameron Wesley's forbears were among them.

The slight, swart Indian in farm overalls, farm work shoes and white cotton workshirt with a collar like a Russian blouse, touched with faded Indian embroidery, explained his plight to Judge Stennis. If the tribal trial finds him guilty, and there are those in the tribe he believes his enemies, he will be sentenced to suicide.

*"They give me gun. They say: 'Go shoot yo'se'f?' I do."*

Choctaw law gives only one defense for killing a human being outside of war, he said; that is accident. The burden of proof that it was accident rests with the defendant. "But if you can't prove it was accident, what will you do?" asked Judge Stennis.

"Shoot myself," said Chief Cameron Wesley slowly.

"But if you change your mind and won't shoot yourself," asked Judge Stennis. "What happens then?"

*"They give gun to my oldest son, John Wesley,"* said Chief Cameron Wesley. *"He shoot me. Make all clean."* \* \* \* \*

[Sept. 20, 1940]

More than 300 men, women and children traveled long miles of dusty country dirt roads, stood for hours under a blazing sun, to witness the strange Indian ceremonies.

Among the first of the spectators to arrive was Judge John C. Stennis of the 16th Mississippi Judicial District, who drove from

his home at DeKalb, Miss. Two weeks ago he presided in the Macon courthouse when Cameron Wesley was tried under white men's law. There, too, was William B. Lucas, Macon attorney, who had defended Cameron Wesley successfully two weeks ago. And there was a force of quiet armed deputies appointed by Sheriff Charles Fraley of Macon, to make sure that whatever the outcome of the trial by the Indian tribe, no bodily harm should come to Cameron Wesley.

Fully 300 white spectators had gathered at the Dancing Rabbit treaty grounds before the first Indian appeared. They copied and snapshotted the massive granite marker on the grounds, placed there by the Daughters of the American Revolution. They copied its deep-craven inscription:

"Here on September 27, 1830, was signed the treaty of Dancing Rabbit creek, by which the Choctaw nation of Indians surrendered their lands to the United States and removed west of the Mississippi. Commissioners, John Coffee and John H. Eaton. Choctaw Chiefs, Greenwood Leflore, Mushulatubbee Little Leader. Erected by Bernard Romans Chapter, D. A. R., Columbus, Miss."

Then, far away amid the trees, the beat of a tribal drum was heard. It was being beaten in slow, steady marching cadence, the cadence by which the human heart pumps blood. Though the scene was sharp and clear in bright and blazing sunlight, men and women and children looked around, startled. Up the dusty road, between high clay banks, through a leafy tunnel of ragged trees, a small band of Indians was seen approaching. In the lead an Indian boy of 14 beat the drum. Behind him marched Indian men, carrying the sticks of their ball game, like Lacrosse sticks. Behind them marched the squaws. By the squaws trudged the papooses old enough to walk, their bare feet kicking up the dust. Some of the squaws carried nursing babies at their breasts.

Their faces were inscrutable. Not a muscle moved save the involuntary twitching of coppery eyelids. Up to the Dancing Rabbit treaty grounds they marched. Squarely beside the grave of Evein Tubbee, the man he slew, descendant of Mushulatubbee, whose name was carved on that monument as a Choctaw chief who signed

the treaty, stood Cameron Wesley, the slayer. In one hand he carried a plant with a flower in bloom. He knelt at the head of the grave. He scooped a hole in the dusty earth with his dark-work-hardened hands, and he placed the flower there. His hands patted the earth about the roots as one familiar with the earth and the things that grow upon its breast.

Then he rose and took two steps. He was close beside the grave yet, but now he was squarely in front of the granite monument on the spot where his ancestors had traded away what today are 25 of Mississippi's 82 counties; traded them away for barrels of rum and a home in the Indian territory that is Oklahoma now.

Then while white spectators strained their ears, the voice of Chief Cameron Wesley rose upon the still, hot air. The cadence of Choctaw, the long-forgotten speech, the language of a dying race, rose and fell, rose and fell.

Paleface nerves were evident in the strained white faces of the spectators who crowded close. But never an emotion showed in the still dark faces of his tribe, standing in a semicircle before him. The group of some 30 Indian men, women and children glowed with color like a rainbow, like a sunrise, like a sunset. Shrill green, flaming scarlet, vivid blue, bright golden yellow, their cotton and silken garb was slashed with embroideries of bright-colored contrasting silk thread and beads of every color in the spectrum.

And this is what Chief Cameron Wesley told them, in the Choctaw that has survived 110 years, intact against the English speech that surrounds it:

"Warriors, women, children of the Choctaw nation, I am your chief, I stand before you here at the spot where our ancestors signed away our land to the white man. My life is in your hands. I have slain a man. If you do not know, thus was the slaying done."

Step by step he rehearsed the fatal day of that Sunday, June 16, 1940. He told how Evein Tubbee had come to his home from Tubbee's home four miles away. He said Tubbee had cursed him and his family, threatened them, hurled rocks through the doors

and windows of their little home, and had danced the war dance around that home. From his own woodpile, Wesley said, the invader had seized a club, waved it like a war club, and threatened to kill them all.

"I did not want to kill. I did not mean to kill," Chief Cameron Wesley's voice rose and fell, rose and fell. The Choctaw cadence was like music on the air. He was not speaking. He was chanting.

"My wife fled, with her youngest baby at her breast," the Chief's voice went on. "My sons fled. My daughters fled. We ran. We knew that the devil of drink was within Evein Tubbee. We knew that when the sun rose again he would be ashamed that he had made war talk to us, his friends.

"I picked up my gun and I fled," the chanting voice went on. "Evein Tubbee ran hard behind me. I could hear his feet upon the ground. I ran faster. I thought every step to feel his club upon my head. Then there was the fence, I knew that I could not leap over that fence. I knew that if I stopped to climb that fence he would kill me."

Dramatically the dark little wisp of a man paused. A Choctaw, graduate of an American school, stood beside The Times-Picayune reporter, translating the chant word by word. The little group who listened felt their own muscles tighten at the drama of the chant, at the suspense of the pause.

"I thrust my gun back of me," went on Chief Cameron Wesley's voice. "I hoped it would make Evein Tubbee stop. So I thrust my gun around my side, with the muzzle pointing at him. And I looked over my shoulder. The gun went off. He fell. I did not mean to shoot him. I meant only to make him stop. But the gun went off. He fell. He was dead. The bullet was in his heart. I had killed him."

Another dramatic pause.

"Men of my nation," Chief Cameron Wesley's voice rose in full chant again. "Women of my nation. Children of my nation. My life is in your hands. It was 110 years ago our ancestors

signed the treaty with the white men on this spot where my father sleeps in his grave beside the grave of the man I killed.

"I have been set free by the white man's law that could have hanged me like a dog. Now I stand before your law, which is my law. The treaty we signed with the white man said that we could live under our laws. I have lived under the Choctaw law. If you say I must die by the Choctaw law, give me the weapon and I will die here by my own hand. If you say that I am banished from my tribe, I will go away, with my cotton unpicked in my fields.

"Men and women are born and they die. But while the clouds come up in the sky, while the water runs, while the rain and sun bring crops out of the earth, the law goes on. I live under our law. I can die under it. It is for you to say.

"I have spoken."

The singing cadence of his voice died away. Silence fell on Dancing Rabbit. You could hear the swift intake of quick-drawn breaths there in the hard hot sunlight.

Impassive, stoic, unflinching, the dark face of Chief Cameron Wesley, set with those black, fathomless eyes looked steadily into the dark faces and the obsidian eyes that were centered on him. The little group of less than 50 Indians stood motionless for some two or three minutes that seemed like a year.

Then, out of the crescent ranks of them stepped Johnny Cotton, their overseer, elected by their own vote. He wore a flowered shirt that might have brought a chuckle from those who saw it. But there was that in his face this moment that would not even let a smile dare to be born of it. Over the hot and dusty bare earth he strode three steps. His hand thrust out. It met and gripped the outthrusting hand of Chief Cameron Wesley.

"Hail, Chief," he said. "I have heard. I believe. I speak to tell you that to me you are a free man and chief as before."

"It is well," said Chief Cameron Wesley.

Both faces might have been carved of some dark wood, for all the emotion they revealed. But that was the moment when a man stepped free of jeopardy.

Eunice Wallace, queen of the Choctaw tribe, stepped forward. Her dark hand thrust out, the Chief gripped it. Then, one by one, men and women and children, they came to where their Chief stood before the great granite marker. The same formula marked each one; the hand grip, the short, spoken phrase, the impassive face.

And there by the grave of the man he slew stood Cameron Wesley. He turned to his white friends.

"I have not all the English to tell you all we say in the Choctaw words," he said. "But they tell me I am their chief for all my life, and they want me to be chief of all the Choctaws in Mississippi."

Then they danced a dance of celebration around the monument that marks the Dancing Rabbit treaty ground. High, shrill Indian yells throbbed through the air. The beat of the drum marked the cadence of leaping feet. The women and children, standing in two lines, facing each other, chanted a clear, musical call as the men circled about them. The lacrosse sticks of their ball game were waved high in air, as tomahawks wave in the war dance.



*Chapter 20*  
*PIONEER COURTS AND JURIES*

## Chapter 20

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## PIONEER COURTS AND JURIES

[Introductory. In the two centuries that elapsed between the original settlement of the Colonies by immigration from Great Britain and the final expansion of government to the territory of the Pacific Coast, there are distinguishable three typical situations in the procedural administration of justice.

The first situation was the Colonial stage of settlement along the Atlantic shores.

The second situation was that of the expansion of settlement into the new States of the Mid-West regions in the era after independence of the new United States.

The third situation evolved from the movement further westward, induced by the early fur-trade and the gold discoveries of the 1840s, before government was organized in the trans-Mississippi regions.

(1) In the *first* of these situations, the Colonial one, justice was administered in the traditional forms of organized government brought over by the colonists. There were of course wide variations of style. In Massachusetts in 1630 the settlers immediately formulated rules of procedure; but their "Court of Assistants" acted both as legislators, executive magistrates, and judges. In the Connecticut settlement of New Haven, it was enacted in 1639 that "the words of God shall be the onely rule to be attended to", and the judges were mostly laymen. In New Hampshire there were courts; but for the first hundred years only two of the judges were lawyers. In New York the early Dutch courts were modeled exactly upon the system brought over from the Netherlands (*post*, Chap. 22, No. 113). In Pennsylvania there were for some time no lawyers on the Bench or at the Bar; but the colonists had early formulated for themselves a well-devised "Frame of Law". In the Carolinas, the ideal "Fundamental Constitutions", composed by the philosopher John Locke, were tried for a short while but then

rejected; and thereafter the procedure was regulated by such postulates of English practice as the few lawyers from England could contribute.

Nevertheless, despite these variances, the general spirit was that of conducting trials according to the orderly traditions brought over from the old country, with a few adaptations to the new environment. The physical surroundings were new, but the ordered habits of life were much the same as before; and within less than a century after the original settlements the procedures were close stereotyped imitations of the inherited models.

(2) But in the *second* situation, or stage, when the pioneers pushed westward over the Appalachian mountain ranges into the rich Mid-West lands, between 1790 and 1840, the conditions were noticeably different. The life of the frontier families was a hard one. Wide spaces of travel were required, for subsistence, for friendship, and for justice. Personal toil, with no slaves and few servants, was the lot of every one. There was much battling with the Indians, whose lands they were invading. There were combats with each other; for among the adventurers were many ruffians and marauders, and quarrels over land-titles were common. Hunting and self-defence made every one familiar with gun and pistol.

Nevertheless, amidst these pioneer conditions they brought with them the inbred traditions of organized government; counties were soon mapped out, and courts were everywhere set up. There were a few law-books and many lawyers, and the standard forms of legal justice soon began to be observed.

However, amid such conditions, in this second type of situation, there was ample room for lusty individuality to develop, both in personnel and in method. In the result there abounded many quaint and peculiar variants from the sober routine which they had left behind, and to which they again settled down after a generation or two of pioneering. Some of these variants are set forth in the following selections.]

## 97. The Circuit Riders of Early Indiana.<sup>1</sup>

### *Slander Suits and Horse-Thieves.*

[Indiana was admitted as a State in 1816. Three judicial circuits were established, each circuit having five or six counties; later the number was increased to five circuits, and again to eleven, each circuit then containing from five to ten counties. The State's dimensions were some 265 miles one way and 160 miles the other way. As the Judges of each Circuit Court moved from county to county, holding several terms a year, they were followed, through forest, river, and prairie, by the attorneys, and the Bar became a peripatetic company of "circuit-riders".—The lively description of them here given would apply equally well in half a dozen mid-west States.]

A band of them, usually a half score, frequently a score in number, looked not unlike a detachment of rangers. Each carried large saddlebags, containing his library on one side and his commissariat on the other. A large, heavy blanket, tightly rolled, was tied on the back of the saddle. A heavy overcoat, used to keep out the cold and rain or as a coverlet, if need be, was either worn or carried. Most of them wore high beaver hats, in various stages of dilapidation—a more uncomfortable or inconvenient article to a horseback rider, especially along a narrow trail, could not be invented.

They usually traveled single file along the narrow trails. Their horses were in many cases as well trained as those of cavalry. Without much guidance by the riders, they picked out the most available paths, dodging mud, rocks, brush and other obstacles. The chief difficulty was that in choosing good footing the horses, frequently Indian ponies, had no regard for the overhanging boughs, which seemed to have a penchant for knocking off the tall beaver hats. Rivers and swollen streams were merely inconveniences. The horses were trained to swim them and, so far as the writer has noticed, no fatal accident happened to Indiana cir-

1. From *Leander J. Monks, Logan Esarey, and Ernest V. Stockley, "Courts and Lawyers of Indiana", Indianapolis, Federal Publishing Co., 1916, vol. I, pp. 142 ff.*

cuit riders on this account. There were no bridges till about 1830. All streams in the State were crossed readily by swimming, except the Wabash and main White river. These were crossed by ferry, though the horses usually swam beside the canoe which carried the master. . . .

Indiana has always been plentifully supplied with taverns, so far as number was considered. The lawyers were always welcomed by the tavern keeper because they rarely complained. Being used to rough fare, they took what was offered them, which was always the best to be had, paid for it without murmur, and went their way.

They were a jolly crowd, without being rough. Occasionally a game of poker was indulged in, and not infrequently a good-natured "rough house" was pulled off, but the usual custom was to pass the time in social, especially political, conversation, where wit and humor were the large factors. Innocent jokes were often perpetrated. When time came to retire, if there was nothing better, the lawyers spread their blankets and cloaks on the floor and, with their feet to the fire, lay down at least to sound sleep if not to pleasant dreams. They joined with full-grown appetites in devastating the corn bread, roasting ears, pork, squirrel, venison or whatever came on the table. . . .

The lawyers were not lacking for amusement to while away the long rides over the dreary roads or the still longer evenings at the crowded hostleries. While the horses were jogging along in the mud, the men made stump speeches, held debates, moot court, preached sermons, or told stories. Many of them earned lasting reputations. Harvey Gregg, who had been educated for theology, was able, according to tradition, to preach an acceptable sermon from every sectarian standpoint then known in the West. He excelled in imitating Baptists and campmeeting Methodists, though it is said he could successfully imitate any preacher he had ever heard. . . .

The judges of the Circuit Courts ranked with the best preachers in social prestige. They represented what was held most sacred in the State, the power and majesty of the law. One is convinced that their decisions carried far greater weight with

the multitude than do the decisions of our present judges. Appeals were far less frequent. As a group they doubtless surpassed in social worth and in their knowledge of the law the rank and file at the bar. Yet they were not a separate caste; they were merely the choice ones of that body. This of course did not mean that the best lawyer was always on the bench, but merely as a rule was that so. There was no social nor intellectual cleavage either between the lawyers at the bar and the judges on the bench. . . . In the highest sense, the work of the judges most nearly resembled that of the preachers. They stood for law and order and good neighborhood. They used the force of the law in accomplishing their object. The preachers stood for the same, but used the force of conscience and public opinion. It was fortunate that in the early period of our State these two institutions worked hand in hand. . . .

The young lawyers, always called "squires," attracted most attention from the court house crowds. They sported what had been bee-gum hats; but stress of rain and frost had weakened the fiber or rotted the glue until many of them resembled on a small scale the leaning tower of Pisa. From beneath this wreck of a former beaver there protruded a long plait of hair, carefully wrapped in an eel skin, which hung to the belt, the whole appendage being called a queue. The young "squires" courted the admiration and homage of the multitude. The lawyers had no office, neither did they prepare their cases; so that if not actually engaged at the bar, they were at leisure to walk around through the crowd and talk politics, for all were candidates for a seat in the Legislature.

The people thought holding court one of the greatest performances in the range of their experience. . . . The country folks would crowd in for ten miles to hear these "great lawyers" plead; and it was a secondary matter with the client whether he won or lost his case, so the "pleading" was loud and long. The substance of the "pleading" was usually historical and political platitudes. They were long on the glories of liberty and freedom, the rights of man, and kindred generalities. . . .

A common action in the early days was for trespass. Nothing would exasperate a farmer so much as to have his crops damaged or perhaps destroyed by a neighbor's cattle. One of the common traditions of the folks who came from the southeast, the Carolinas and Kentucky, was that the uninclosed land formed a public pasture. They resisted long and successfully any attempt at what they called the "stock law," whereby they would be compelled to fence their own stock in rather than their neighbors' stock out. . . . These trespass suits were the most bitter legal contests had in the early years. Lawyers were employed and costs incurred out of all proportion to the damages sought. The man who lost in one of these neighborhood feuds, for they usually resulted in such, was disgraced. . . .

Another class of suits closely akin to the above was the replevin. All stock ran at large. Each farmer had his registered stock mark, which usually consisted of some kind of slashes of the animals' ears. . . . Sucklings pigs and calves were not supposed to be marked until they became "weanlings." As might be inferred, at the weaning period was the proper time to steal stock. Many owners neglected to mark their stock at the proper time. The natural result of all these customs was endless petty litigation, much of which, originating in the Justices' Courts, was carried to the Circuit and Supreme courts. As in the case of the trespass suits, the real foundation of the litigation, the fuel that fed the flame, was the animus between the parties rather than the property at stake. It was great fun for the younger attorneys to get in a case of this kind, bring out all the folks in the neighborhood as witnesses, and, after the evidence was in, to argue a day or two before the jury for the benefit of the parties and their friends who crowded in to hear the lawyers "roast" the parties, the witnesses and one another.

A third class of cases, which takes us over into the Criminal Court, arose from the violence common to the frontier. Fighting was common and every man had to sustain his reputation for physical courage. The ordinary man never thought of going to court. He fought it out, shook hands with his opponent, and all was over.

But in most every neighborhood there lived some "colonel," who tried to sustain an undeserved reputation for bravery by the aid of the Courts. "Provoke" and slander suits were his main reliance. These suits also offered the lawyers great opportunities for arguments, especially in establishing character or the opposite. . . .

Here is a slander case. In one of the oldest communities of the Whitewater valley, society had been thrown into two hostile factions by the slanderous statement of one woman that another had stolen a goose. All the women in the community were in the court house as witnesses, and all the men had come to hear the lawyers and see fair play generally. There were a score of witnesses to prove character, though nobody's character was ever questioned. There was a like number of witnesses to prove the spoken words, which nobody denied. The whole question hinged on the ownership of the goose. The plaintiff, represented by Governor David Wallace, Senator James Noble and General McKinney, proved that she owned and always had owned the goose in question from the time it bursted its shell. The defendant, represented by William R. Morris and Senator O. H. Smith, proved by an equal number of witnesses that she had raised and always owned the said goose. She had proved that as a young gosling it had a peculiar habit of wanting to play in the water. The case seemed on the "ridge." After noon the plaintiffs asked leave to introduce one more witness. She was a dignified old lady of seventy years. She testified that for sixty years she had been intimately acquainted with geese, knew the one in question well, and knew it belonged to the plaintiff. "Take the witness," said Mr. Wallace. Smith was suspicious and advised that no cross questions be asked. He was overruled, however, and Mr. Morris asked: "How do you know that this particular goose belonged to the plaintiff?" "Because she was white and *paced*. I owned her great-grandmother and *she paced*, and so did all of that breed." The answer was conclusive and determined the suit, in spite of a two-days' argument. Nor did it occur to the defendant or her lawyers that *all geese paced*! . . . .

These suits were all petty, however, when compared with the trials of the three great criminals of the early days—the murderer, the horse-thief, and the counterfeiter. While the litigants in the former cases were in deadly earnest, the attorneys and judges usually regarded them with less seriousness. On the other hand, there was solemnity on the countenance of every one at a murder trial. The judges and attorneys were especially circumspect lest justice be not done. The rules of law were applied with the utmost nicety by the judge. The lawyers were alert that no opportunity pass by which they might profit. The jury was drawn with utmost care. The lawyers usually divided the work, and the one who was to make the final appeal studied the jury narrowly throughout the trial for any evidence of sentiment, passion, prejudice, or interest. As a result of these passionate pleas, the juries frequently rode down both law and evidence in their verdicts. An experienced advocate was well nigh irresistible before a backwoods jury.

In the early days many horse thieves rendezvoused on the north bank of the Ohio, in what was then Clark county; when arrested, they usually evaded the law by means of a new trial, setting aside the verdict of the jury, or otherwise. The judge, an honest man, was applying the law honestly, but, feeling that public opinion was against him, he resigned. In his place was appointed Marston G. Clark, a cousin of the conqueror of Kaskaskia. He was unused to the law, but a man of good sense and integrity. The log jail was full of horse thieves. The penalty provided then by law was thirty-nine lashes on the bare back. The grand jury did its duty, and the first case, against John Long, was called. The Court ordered the sheriff to bring in the prisoner. "There he is," responded the officer, "I brought him along with me." The judge then read the indictment charging him with stealing an Indian pony. Before the prisoner could answer, the attorney arose, saying: "May it please your Honor, we plead in abatement that it is a misnomer. His name is John H. Long." The judge overruled the plea, saying he was well acquainted with the defendant and was satisfied they had the right man. "We then move to quash the

indictment," said the attorney. "State your objections." "First, there is no value of the horse laid. Second, it is charged in the indictment to be a horse, when in reality he is a gelding." "I know an Indian pony is worth ten dollars," returned the judge, "and I shall consider that a gelding is a horse. Motion is overruled." The trial proceeded, to a verdict of thirty-nine lashes. Counsel then moved in arrest of judgment that it was not proved that the horse was stolen in Indiana. "That I consider a more serious objection. I will consider it till morning," ruled the Court. "Sheriff, keep the prisoner safe and adjourn court." As soon as the crowd was gone, he turned to the sheriff. "Sheriff, at twelve o'clock tonight, you and your deputy take the prisoner into the woods, well beyond hearing, and give him thirty-nine lashes well laid on the bare back, put him in jail, and bring him into court in the morning and say nothing to anyone." The order was obeyed and Court convened in due course. "I have been thinking of the motion in arrest and feel it best to grant a new trial." Long sprang to his feet. "Oh, no! for Heaven's sake, I am almost whipped to death. I discharge my attorney and withdraw the motion." Judge: "Very well; clerk, enter the verdict and mark it satisfied. Call the next." No more dilatory motions were made.

#### 98. The Old Dam-error-ah Court of Common Pleas in Cincinnati.<sup>1</sup>

##### *Lay Judges and Law Judges Disagree.*

[The Old Court House was built in 1819, but was destroyed by fire in 1849. The narrator, a practitioner and later a judge, is describing the practice of his profession in the Cincinnati region in the middle 1800s:]

In the days of the Old Court House, the Court of Common Pleas consisted of four judges sitting in a row upon the bench—long enough quite to accommodate them all, at their ease, in big arm-chairs—one president, or presiding judge, and his three associates.

1. From A. G. W. Carter, "The Old Court House: Reminiscences and Anecdotes of the Courts and Bar of Cincinnati," Cincinnati, P. G. Thomson, 1880, p. 28.

The first was always presumed and assumed to be a lawyer, learned in the law; the latter having no presumption in their favor in that regard, but always plenty of assumption themselves! They were generally old, sober and sedate citizens who might have been once aldermen, or justices of the peace, or farmers, or shoemakers, or what not?—chosen, by the Legislature of the State, to the bench to aid and help the presiding judge in his arduous legal duties by the infusion, once in a while, of a little good, hard common sense. . . . In a full court, the business of litigation was mostly transacted by the presiding judge, either with or without a jury, as the particular nature of the business required or was demanded by the lawyers, and it was not expected by any one that the associates would interfere—though they sometimes did interfere, and that, too, materially.

On one occasion, Lawyer Gaslay, talented but strong-headed and obstinate, had a matter of legal importance before the full bench—a *quo warranto* or *mandamus* writ, or something of that sort, which he most anxiously desired the Court to grant against certain defendants, and he pressed the matter before the Court in full, with all the ardency of his nature. He convinced, by his legal eloquence, the presiding judge, who was that good old soul—though not very learned lawyer—George P. Torrence, that he was right, and the presiding judge was about to grant the writ in his capacity of overruling judge. But the associates did not agree with him—not one of them—and, being a majority of the Court, had the right to, and would have overruled Judge Torrence.

So, in the dilemma, the good-natured presiding judge said to Mr. Gazlay, "We will take the papers, and the Court will decide the matter to-morrow morning."

The morrow morning came, and the full Court was in session, and lawyer Gazlay was present in patient expectation that the writ would be of course granted by the Court, as yesterday the presiding judge was in his favor, and he was the only and sole judge of the law. But what was his surprise when the presiding judge announced that "he had carefully examined the papers and was now convinced that the writ ought *not* to be granted, and *could* not be

*legally* granted;" "but," said he, "my brother associates upon the bench are now convinced that *the writ ought to be granted*,—each and all of them; and thus, with the tables turned this morning, they still disagree with me: we will further consider this matter."

Gazlay—"But I want the writ granted *now*. It is a matter of prime necessity——."

Presiding Judge—"We cannot help that. I am convinced that you have no legal rights here, and I will convince my associates."

Gazlay—"But they are a majority of the Court and they will now grant the writ."

Presiding Judge—"But I mean to convince them *my* way."

Gazlay—"They never will go *your* way in this matter. This Court is a regular 'Demárara Team!'"

Presiding Judge—"What do you mean by that, brother Gazlay? What do you mean by that?"

Gazlay—"I mean what I say. This court is a Demárara Team, composed of *one mule and three jackasses*; when the mule wants to go, the jackasses won't, and when the jackasses want to move, the mule won't budge a step!"

Presiding Judge—"This is contempt of court, brother Gazlay, and I fine you ten dollars for contempt."

Gazlay—"No matter what you do—the *ass*-ociates will not go with you."

Presiding Judge—"Sit down, brother Gazlay; we will have no more of this. If we are a Dam-error-ah Team, drive on with your man-dam-us! We will hear you further in argument."

So, with the good humor produced by this jolly sally of the social and clever presiding judge, Mr. Gazlay went on with his case, and, after the fullest of arguments presented by him, the Demárara Team told him that they would grant him the writ of *mandamus*, preliminarily; that he might drive on for a while, and then they would wait for the wagon on the other side. And this pleased all concerned, and settled matters.

From this early time forth, this term of "Demárara Team" adhered to the judges of the old Court of Common Pleas of the old court house all through its existence; and many were the jokes perpetrated on account of it among the lawyers and between them and the judges, in and out of court.

#### 99. A Country Justice in Early Ohio Days.<sup>1</sup>

##### *Squire Sedam maintained his own Bastile.*

[The Old Court House was built in 1819, but was destroyed by fire in 1849. The narrator, a practitioner and later a judge, is describing the practice of his profession in the Cincinnati region in the middle 1800s:]

Every one of the present day knows of, or has heard of, 'Squire Sedam, of Sedamsville, of Storrs Township. It is but a few years since he "shuffled off this mortal coil," after attaining upwards of three-score years and ten. Well, of all justices, he, perhaps, was the most peculiar, particular, persistent, peremptory, persevering, predominant, preëminent, and personally popular. He was lord of the manor; he was monarch of all he surveyed. I believe he laid out and surveyed Storrs Township, and he was King Henry the First, of Storrs Township, if not King Henry the Eighth, whom in many delicate respects, he resembled, however, and king of his own Star chamber, too. With all his dogmatic and arbitrary ways, and legal and other kind of ignorance, he used to do a great deal of good after his manner, and for that reason continued to hold his magisterial office for many terms of years.

His neighborhood had been infested with chicken thieves, and many and many were the complaints of his neighbors to him. He had always had a faithful constable (that is, always faithful to him in his office), and he sent this constable out, ever and anon, to look up and catch the chicken thieves. At last the constable caught a notorious one, and brought him before the 'Squire. The 'Squire put

1. From A. G. W. Carter, "The Old Court House: Reminiscences and Anecdotes of the Courts and Bar of Cincinnati," Cincinnati, P. G. Thomson, 1880, p. 28.

him to trial immediately, and the evidence plainly convicted the man. "Now," said the 'Squire, "you chicken thief, I am going to banish you to Kentucky—over the river to Kentucky, and the sentence of the Court is, that you be immediately banished to the State of Kentucky, and the Court itself will see the sentence carried out in full." Whereupon, the 'Squire ordered the constable to bring the man along, and his own residence and office being on the bank of the Ohio river, he went down to the river, put the man into a skiff, and ordered the constable to get in and row the man over the river to the shores of Kentucky, telling the man that it would be certain death to him if he ever came back. The constable rowed him over, and *that man never did come back!*

The 'Squire and the Lawyer Flinn: Whatever the judgments of the 'Squire were, he would never allow an appeal to the higher Courts from his judgments. He never would furnish any lawyer a transcript of his judgment upon which to take an appeal. Upon one occasion the lawyer, big Jake Flinn, tried a case before Sedam, and Jake's client was beaten, and a judgment was rendered against him, much to the vexation and deep chagrin of lawyer Flinn. He immediately gave notice of an appeal, and demanded peremptorily from the 'Squire a transcript of the proceedings before him. The 'Squire refused, as peremptorily, to write out or give a transcript. A quarrel ensued, and almost a fight between the 'Squire and lawyer; and at last the dogmatic Dogberry ordered the lawyer into durance vile.

And into where, think you? Why, the 'Squire had his own prison on his own premises, which he called the *Bastile*. He never had any use for the county jail or any other jail but his own bastile, and into this he always cast the prisoners who were brought before him. This was at first a milk-house on the side of a hill on his premises; but the idea of using it for a prison struck his illuminated mind, and he employed workmen and made it one, the opening to the damp stone walls within being a large iron door, the key of which he kept himself, and above which he had placed two crossed daggers for a portentous sign. Into this bastile, himself and the constable, after much scuffle and labored effort, placed the redoubt-



able Jake Flinn, and getting him once in there, left him there, too, until Jake purged himself of his contempt of court by declaring to the arbitrary 'Squire that he would not demand a transcript, and would not take an appeal; and Jake, getting out, was as good as his word, rather than have any more fuss with his old Jackson Democratic friend, 'Squire Sedam, of Storrs; for Jake was a candidate before the Democratic convention for the nomination for the Legislature, and he knew well that 'Squire Sedam would be *the* delegate from Storrs.

The 'Squire's court room, and the big Bombshell: Right near his mansion house, old 'Squire Sedam had an especial building erected for the purposes of his court, and he called it, by a big sign painted over its door, the "Store's Township Court House." (Why "Storrs" was spelled "Store's," was among the things that have not transpired, though the 'Squire if he was to blame, was not very learned, or skilled in orthography at all. "Storrs" is however, pronounced *Stores*.) The lower room of this two-story structure was the court room, and was adorned with a bench and a bar, separated from the auditorium by a balustrade. The walls of the court room were hung with daggers, bowie-knives, butcher-knives, guns and pistols, and various other stolen articles, trophies of justice which the old 'Squire had taken from miscreants who had been brought and tried before him, and these he considered as deodands to him, the veritable king of Storrs Township.

Among other singular and peculiar things in his court room was a large bombshell, which had been brought or stolen from some battle-field, and had been presented to the 'Squire. It laid on the floor near the judge's bench, and when in long days ago, I, as a lawyer, asked the 'Squire "what that bombshell was for, lying in the court room?" He replied:—

"Oh, I keep it there, for my juries."

"How is that?" I ventured to ask.

"Well, you see," says he, "I always want my juries to agree, and bring in a verdict *quickly*; so when a case is submitted to them, I close my charge by telling them—and I mean it—that now the

Court will leave them to consult together, shut up in the court room, and then I point out that *bombshell* to them, and tell them that there is a fuse to it going through outside, and if they do not agree on a verdict at the end of five minutes, I will fire the fuse, and blow them sky-high; and of course all the juries in my court *always agree in five minutes*; and I have no trouble with my juries at all." I thought, he had not!

## 100. Trial Practice in Early West Virginia.<sup>1</sup>

### *Drawn Guns follow the Jury's Verdict.*

A few days ago I hurried to the Pennsylvania railway station in the city of Bucyrus, Ohio, to catch train No. 9 going west. It was a cold dreary day, a drizzling rain adding to the discomfort of the weather. Arriving at the depot, I found No. 9 marked late on the time board, and also found the waiting room and most of the depot in the hands of a gang of painters. Looking for some place of warmth I entered the baggage room, where I found a roaring fire in a big old-fashioned coal stove, and gathered around it quite a crowd, who like myself were waiting for the belated train.

I saw at once that they were enjoying themselves, and joining them I found that a couple of attorneys were relating personal experiences and short anecdotes of their legal brethren, much to the amusement of their listeners. . . . During the relating of the foregoing anecdotes by the two lawyers, I had noticed a rather tall gentleman who was a very much interested listener. He now said: "Did either of you gentlemen ever attend a trial down in the mountains of West Virginia?" They both replied that they had not. Thereupon he began:

"I was down in that country last fall on a matter of business and wanted to see a man by the name of Bevier, whose home was, I was told, 'some place up there.' Engaging a guide, I set out in search of him, and after riding about thirty-five miles over hills and mountains I finally came to his house. But, in response to

1. From *D. W. Locke*, "Echoes from the Baggage Room", *The Green Bag*, 1906, vol. XVIII, p. 255; reprinted from the *Ohio Law Bulletin*, n. d.

our 'halloo,' his wife came to the door. My guide asked where Bevier was, when his wife said, 'He done gone ovah to the schoolhouse. Thes a trial ovah thar to-day. He tuk his gun along. Spect thar'll be doin's ovah there to-day.' I asked her what the trial was about. She said that 'ole man Rawson was tryin' to make ole man Swisher pay for a dawg that Rawson sed Swisher had stole frum him.' Well, we went on to the schoolhouse. On the way, my guide said to me that if I had a gun I should give it to him and he would lay it on the table, as it would be an insult to the Court to enter the court room carrying a 'gun.' I had no 'gun,' but my guide took his and laid it on the table, where to my intense surprise I saw two stacks, pointing every way, apparently a 'gun' for every man in the house, and there were in the neighborhood of fifty present.

"The testimony was all in before we got there; but it seemed that the plaintiff had testified that Swisher had coaxed the dog away from his house and kept him, much to his damage and loss. The defendant had denied the coaxing the dog from his neighbor, and, on the other hand, had testified that the dog had come to his place half starved and mangy. That out of pity he had fed him and taken care of him, as a stray dog, and even if it was Rawson's dog, he should not have any damages against Swisher, as the dog was now well and hearty and in better condition than when it left Rawson's.

"By the time my informant had furnished me the evidence, the Justice was ready with his decision, which was 'that Swisher should return the dog to Rawson and pay the costs in the case, which would be one dollar and one half.' Then there was much whispering and careful searching of pockets among the adherents of Swisher, but the entire amount the whole crowd could raise was just fifty cents. Thereupon the Court ordered the constable to keep Swisher in custody, until the dollar was forthcoming. Court then adjourned; the men gathered up their 'guns' and filed out.

"My guide whispered to me that if the men mounted their horses and began to spur them and make them 'cavort' around that I should seek cover, as there would surely be something 'doin'.' Just out-

side of the door was a very large tree. The constable and his prisoner had barely crossed the threshold, when somebody said something to the constable that attracted his attention for the moment. Quick as a flash, Swisher gave a jump, and was behind that tree, and then you ought to have seen him run. The hound that was the subject of the trial could not have caught him as he went flying up the side of the hill, running zigzag to avoid any possible bullets that might come his way. A great hubbub arose, and the Justice, coming to the door, and seeing the crestfallen constable minus his prisoner, shouted, 'You constable, I'll hold you for the dollar costs; you'll pay me that dollar yourself.' With a nasty growl the constable whirled, and with a savage oath stuck a big 'gun' at the old Justice, accompanied with the order, 'You old fool, you git in thar and shet youah mouth,' which order the J. P. promptly obeyed. There was a hasty mounting of horses, with spurs driven home, and such rearing and plunging, accompanied by confused swearing, that I also, following the old justice's example, took to cover by running behind the schoolhouse.

"But, anxious to see what was going on, I risked peering around the corner; the factions had separated, and scowling at each other were drawn up across the road in two parallel lines, each man ready for action and apparently but waiting for the signal to begin, when an old gray-haired, long-whiskered patriarch, evidently the oldest man present, handing the reins of his horse to his neighbor, dismounted and walked out into the road, between the two lines of hostile, angry men. Tall and angular, yet as he straightened his bent form there was something of majesty about the old fellow as he raised his hand, and said:

"'Boys, youalls know me; youalls know what I done over on Hog-Back; youalls know what I done ovah on Snake Creek; youalls know I *ain't afeard to shoot*; but, boys, youalls know that up thar on them hills the cohn crop ain't bin so very good this hyar year; youalls know that ovah in yondah fiels is some tobaccy crops that is a mighty poor yield; and you boys knows that up among these hills stands many a empty hawg pen, that was left so by the cholery that killed off so many of our shotes this spring; and now,

boys, ef we'ens goes to shootin, to-day there'll be some widders up there, that when winter-time comes is goin' to be mighty hungry, and there'll be some orphans that'll be turrible cold when the snow flies. And say, boys, let's we'ens not do any shootin' to-day!

"All the appeal of the natural orator was in the concluding sentence, and as he dropped his hand and bowed his head, in the hush that followed I walked out to where the constable was standing and said to him, 'Here is a dollar; pay up the justice and do as the old man says.' He looked at me for a brief moment, and then, seeing that I was in earnest, reached out his hand and gave me a shake that meant volumes, as he fairly shouted, 'Put her thar, stranger. I don't know whar youall come frum, but I do know that youall am squar. Have a drink on me,' and with his other hand he dived down into a side pocket and pulled out a great bottle of muriatic acid that I was perforce compelled to partake of, and would have handed it back had not the old man with a gesture unmistakable started the bottle on its rounds as a peacemaker, and it did not return until its message of good-fellowship was all told, and with a joyous shout the entire company rode over the hills to Rawson's to have it refilled."

#### 101. A Hung Court in Alabama, A.D. 1840.<sup>1</sup>

##### *A Suit about a Jackass disrupts Public Opinion.*

Most of our readers have heard of a hung *jury*, but have they ever heard of a hung *court*? If not, I beg leave to introduce them

1. From *Joseph G. Baldwin*, "The Flush Times of Alabama and Mississippi," New York, Appleton, 1854, p. 276.

This once celebrated chronicle of Bench and Bar of the Southwest (as those States were termed in the 1850s) teems with amusing anecdotes of professional life of the period. On page 161 begins "The Earthquake Story", and in Henry C. Whitney's "Life on the Circuit with Lincoln" occurs this statement: "Lincoln's favorite story when on the circuit was known as the Earthquake Story, and he used to read it aloud in our room from 'Flush Times in Alabama'. I still have the book, and the leaves where the story is are loose from so much use of it by Lincoln."—The present editor owes the foregoing citation to Mr. H. E. Barker, specializing in Lincolniana, of Los Angeles, California, and to a copy of "Flush Times" presented to the editor by Governor Henry Horner of Illinois, a devoted collector of Lincolniana.

to an instance of it, and show how it came about, and how it got unhung.

A justice of the peace in Alabama has jurisdiction in cases of debt, to the extent of fifty dollars; and there are two justices for every captain's beat. It was usual, when a case of much interest came on, for one justice to call in the other as associate. On one occasion, the little town of Splitskull, in ——— County, was thrown into a flutter of excitement, by a suit brought by one Smith against one Johnston, for forty dollars, due on a trade for a jack-ass, but payment of which was resisted, on the plea that the jackass turned out to be valueless. The parties—the ass excluded—were brothers-in-law, and the "connection" very numerous; the ass, too, was well known, and shared the usual fate of notoriety—a great deal of good, and a somewhat greater amount of bad, repute.

The issue turned upon the worth of the jack, and his standing in the community. Partisan feeling was a good deal aroused—the community grew very much excited—several fights arose from the matter, and it was *said* that a constable's election had been decided upon the issue of jackass *vel non*. . . . Unfortunately, politics at that time were raging wildly; and the name of the jack being *Dick Johnson*, and one of the parties being a whig and the other a democrat, that disturbing element was thrown in. . . .

After the parties employed their lawyers, the note of busy preparation rang more loudly throughout the settlement. Forty witnesses a side were subpoenaed. The people turned out as to a muster. The pro-ass party, and the anti-ass party made themselves busy in getting things ready for trial. The justices preserved an air of mysterious and dignified impartiality, and all attempts to sound them on the question proved abortive. . . . The plaintiff, Smith, was fortunate enough to employ Tom B. Devill, an old lawyer who had great experience in the courts of the county, especially in such fancy cases as the present, . . . while the rival faction were thrown upon young Ned Boller, a promising disciple in the same department of the profession. . . .

The canvassing of the witnesses, and preparations for trial, played the very mischief with the harmony of the settlement. The

people had come in from one of the older Southern States, for the most part, and were known to each other, and had been for many years, and before they had come out;—unfortunately, being known has its disadvantages as well as advantages. . . . The plaintiff, knowing the advantage of having a persecuted individual in view of the evidence, had brought Dick Johnson [the ass] under a *subpoena duces tecum*, on the ground; and the groom, Hal Piles, made him go through the motions very grandly—rearing up—braying his loudest, and kicking up other rustics. . . .

The trial came on. It lasted several days. The place of the trial was the back-room of the grocery, the crowd standing outside or in the front-room; but this not affording space enough, it was adjourned to the grove in front of the meeting-house; and ropes were drawn around an area in front for the lawyers, Court, and witnesses. . . .

At length the case was put to the justices, and they withdrew to consider their judgment. They remained out, in consultation, for a good while. The anxiety of the crowd and the parties was intense, and kept growing, the longer they staid out. A dozen bets were taken on the result; and fourteen fights were made up, to take place as soon as the case was decided. At least twenty men had deferred getting drunk, until they could hear the issue of this great suit.

The justices started to return to their places—and “here they come!” being cried out, the crowd (or rather crowds) scattered about the hamlet came rushing up from all quarters to hear the news.

Silence being ordered by the constable, you might have seen a hundred open mouths (as if hearing were taken in at that hole) gaping over the rope against which the crowd pressed. Justice Crousehorn hemmed three times, and then, with a tremulous voice, announced that the “Court ar hung,”—one and one.

Now here was a fix. What was to be done? In vain the “Digest” was looked into; in vain “Smith’s Justice” was searched. Nothing could be found to throw light on the matter. But the case

had to be tried; if decided either way, “there was abundance of authority,” as Rushong well suggested, to show that the defeated party could appeal; but here there was no judgment! Ned Boller insisted that the defendant had really gained the case, as the plaintiff must show himself entitled to judgment before he could get it; and likened it to a case of failure of proof: but, on this point, the Court divided again. . . .

The crowd outside now raised a terrible row, disputing as to who had won the bets—the betters betting on a particular side’s winning contending that they had not lost, as such a thing as a hung court “wasn’t took into the calcu.” But their adversaries claimed that the bet was to be literally construed.

At length a brilliant idea struck Mr. Justice Crousehorn—which was, that his brother Rushong should sit and give judgment alone, and then, afterwards, that he, Crousehorn, should sit and grant a new trial. Accordingly, this was agreed to.

Justice Rushong took the bench, and Squire Crousehorn retired. The former then gave judgment for the plaintiff; which the crowd, not knowing the arrangement, hearing, the pro-ass-ites raised a deafening shout of triumph, in which Dick Johnson joined with one of his loudest and longest brays.

But brother Crousehorn, then taking the seat of justice, speedily checked these manifestations of applause, by announcing he had granted a new trial, which caused the anti-ass-ites to set up a counter-shout, in which Richard also joined. So the cause was gotten back again to where it was before, and then was continued for further proceedings.

But what was to be done with the case *now*? If tried again, the same result would happen, and there was no election of new justices for eighteen months; the costs, in the mean time, amounting to an enormous sum. The lawyers now got together, and settled it. Each party was to pay his own costs—Tom B. Devill took the jack-ass for his fee, and was to pay Ned Boller ten dollars of his fee, and the forty dollar note was to be paid to the plaintiff; an arrange-

ment whereby the parties only lost about fifty dollars a-piece, besides the amount in controversy. But the heart-burnings and excitement the great trial left, were incapable of compromise, and so they remain to this day.

## 102. A Murder Trial in Pioneer Days in Arkansas.<sup>1</sup>

### *Guaranteeing Fair Play with Six-Shooters.*

I was born in Mount Gilead, Ohio, on the 19th of December, 1844. Father moved his family to Lawrence, Kansas, in the spring of 1857. That summer we occupied the historical log cabin that J. H. Lane and Gaius Jenkins had trouble over, resulting in the tragic death of the latter. Shortly prior to the killing of Jenkins, we moved to Peru, Indiana, where we remained until the latter part of March, 1861, when the family returned to Kansas. Myself and oldest brother traveled overland by team and wagon. We had three head of horses. We left the State line of Indiana at Danville, and crossed the Mississippi to Hannibal, Missouri, the day that General Beauregard fired on Fort Sumter. And the War of the Rebellion was on. . . .

The first camp-fires of the slaveholders' rebellion were kindled on Kansas soil, five years before P. G. T. Beauregard fired the shot on Fort Sumter that was heard around the world, and saddened every home in our land. The horde of Border Ruffians that had bent every energy from 1856 and 1857 to fasten the system of human slavery in Kansas Territory having dismally failed, after leaving a trail of blood and carnage behind them, "silently folded their tents" and recrossed the border. But when actual hostilities came in 1861 on a national scale, the spirit of revenge came to the front and Kansas must suffer. Men of desperate character from Kentucky, Mississippi, and Louisiana came out and up to join the Missourians to help them even up with Kansans for their failure to make Kansas a Slave State.

1. From *John R. Cook*, "The Border and the Buffalo", first printed about 1905; reprinted in *Lakeside Classics*, ed. Milo M. Quaife, 1938, pp. 3, 38, 44-55, 56-63, in part; Chicago, R. R. Donnelley & Sons Company, Lakeside Press.

And what a field for operations! At that time the border on both sides of the line was sparsely settled, from Kansas City to the Indian Territory and to the Arkansas line, thus affording many quiet hiding-places between depredations committed.

After being home a few days I returned to Fort Scott, to learn that my company had marched to Fort Smith, Ark. . . . We arrived at Fort Smith in late December, and on January 1, 1864, my regiment was reunited, except H Company, and kept so until the close of the war. . . . We were mustered out of service at Little Rock, Ark., June 30th, 1865, and finally discharged, paid off, and disbanded at Lawrence, Kansas, July 20th. . . . In 1867 I went to Labette County, and located on 160 acres of land three miles from where the notorious Bender family committed their horrible murders in 1873. . . .

During the latter part of the winter of 1869, the two Oden brothers killed young Parker over a claim dispute. The killing took place at the house on the disputed claim near the mouth of Onion Creek, on the west side of the Verdigris River, in Montgomery County, which was not yet organized. Osage Township, the one I lived in, in Labette County, was the nearest judicial point to the place of the killing. A mob gathered and surrounded the Oden house near the scene of the murder (as it afterwards proved to be). The mob's purpose was to give the Odens a trial, with Judge Lynch on the bench. But when inky darkness came on, the Odens slipped by the guards and went to and surrendered to the justice of the peace, Wm. H. Carpenter, of Osage Township.

I was township constable at the time. Their revolvers, four in number, were handed to me. Subpoenas were given to me to serve on witnesses for the defense, in the neighborhood where the deed was perpetrated. I deputized Henry Waymire to take charge of Bill Oden during my absence; also, Mahlon King, the son of a Methodist minister, to go with me to Onion Creek and help to guard and protect Tom Oden, whom we took with us, by his own and also by his brother's request. Tom had told us, which proved to be true, that if he went home alone he might be killed; that his

wife was in delicate health, and that he was anxious to see her and allay her fears about him.

We left the residence of the Justice of the Peace about four in the afternoon. It was twenty-five miles southwest to where we were to go. When darkness came on we were on a treeless prairie, taking a course for a trading-post near the mouth of Pumpkin Creek, where we arrived about ten o'clock at night. We found about twenty-five men who had congregated there before we reached the post. We had tied a large woolen scarf around the neck, face, and head of our volunteer prisoner, and passed him off for one of my deputies.

One of the witnesses that I was to subpoena was a clerk at this trading-post. I dismounted, went inside, and handed a copy of the subpoena to the clerk, took a look at the crowd, and was starting out, when one of the party asked me where the Odens were. My reply was, "Under a strong guard at Timber Hill." I was then asked who the other two fellows were outside. I answered, "Two deputy constables." I was then asked to take a glass of whisky. I replied that I never drank, which was the second misstatement I had made to them. That was an ominous-looking crowd. I learned afterwards that my first lie had saved Tom Oden's life for a time, and perhaps Mahlon King's and my own. Had the prisoner not given himself up to the majesty of the law? And was he not entitled to a fair trial by the law? And would it not have been inexcusable cowardice had we not defended him to the last?

After leaving the traders we soon came to the Verdigris River, which was more than half bank-full, and was sparsely settled on both sides to the Indian Territory line. Near the mouth of Onion Creek we left our horses at an old negro's on the east bank of the river and called up Mr. Phelps, who lived on the west bank eighty rods down the river. At this time I did not know Mr. Phelps was to be the main witness for the State against the Odens. Tom Oden said to me, when we arrived opposite Mr. Phelps's, that "Old Phelps keeps a skiff, and if you will call him up we can cross here; then it is only a mile down home, with a plain road all the way."

Then he added, "I'd rather not let the old man know who I am at present, and if I was to call for him he might recognize my voice."

I hallooed twice, and the response was, "What is wanted?" I answered, "There are three of us here from the Timber Hills, and we wish to cross the river." He remarked, "It is now nearly midnight. Can't you go to the house a little way down the river and wait till morning? Then I'll row you over." I told him our business was urgent, and that we must cross at once. He said, "All right; I'll soon be there."

When Mr. Phelps came down the bank he set a lantern in the bow of the boat. He did not use oars, but sat in the stern and paddled across, and, as he neared our side, let the boat drift to the bank, bow up-stream.

I caught the gunwhale at the bow and said to the prisoner, who yet had his head and face muffled, "Rogers, you get in first."

Mr. Phelps said, "I can't take but two of you at once."

I said, "Mahlon, you get in here, then, near the bow."

Mr. Phelps then asked me to hold the lantern up high, as he believed he could make the other bank at a place he wished to land, better than if they took the lantern with them. The river here was about 200 feet wide, and very deep, with a strong current. The boat had not gotten more than ten feet from the shore, when Oden shifted his position suddenly, which tilted the boat violently and threw Mr. Phelps into the river. I called to Mahlon King to throw me the bow-line, but he caught up the line and leaped towards shore, the bank at that place being a gradual slope towards shore. He made a few strokes, and found footing.

Phelps, being in the stern of the boat when tilted out, was farther out in the stream, for he had backed out to swing the bow around, and when pitched out he was in deep and pretty swift water. There were some long overhanging limbs just below him, which, on account of the swollen condition of the stream, nearly reached the water. Mr. Phelps was calling for help. I dropped the lantern, jerked both six-shooters out of their scabbards, dropped them on the ground, ran down the stream about thirty feet, plunged in, and

swam out under the branches, just in time to catch Mr. Phelps by his coat-sleeve with my right hand, at the same time holding on to a sweeping limb with my left hand. Soon we were ashore, paddle and all, for he had hung onto it while struggling in the water.

Here we were, three of us, wet as drowned rats, and Tom Oden, a cold-blooded murderer, dry as a powder-horn.

I had not the slightest suspicion at the time that Oden tilted the boat intentionally, hoping to drown Mr. Phelps in order to get rid of a damaging witness against the Odens. Replacing my pistols in their holsters, I got in the boat in front of Mr. Phelps and said, "Now, Rogers, get in and we will try it again, and be very careful and sit still." Whether he thought, by my getting in the boat instead of King, that my suspicions were aroused and that I might shoot him in another attempt to tilt the boat, I am unable to say.

We went on to Oden's cabin, after crossing, and before a large open fireplace dried our clothing, and got a few cat-naps before daylight. All the time and throughout the entire day until we started back, Tom Oden was in an adjoining room with Mrs. Oden.

I left King at the house, and rode to different cabins that forenoon, hunting for the witnesses I had subpoenas for. I could not help but notice that a pall had fallen over the people. Expressions of lament, and the high esteem in which Parker had been held by the entire community,—this, together with their outspoken condemnation, from men who had grown to manhood on the frontier, boded no good for the Odens. And I felt that the brand of Cain and the seal of death had been placed upon them.

When I came back to the Oden cabin, I got King and Oden together and gave them my impressions; and Oden said, "Yes, there are men in this country that want us put out of the way;" meaning himself and his brother. I said, "We must still carry out our deception and claim him as belonging in our party." Accordingly, we planned to leave for Timber Hill at four o'clock. I walked up to Mr. Phelps's, and got him to set me back across the river.

From there I went to the old darky's and got the three horses, and went down the river a mile and a half to where the other two men had crossed the river, quite at the mouth of Onion Creek.

After mounting I said, "Now, boys, you two keep right up the river, pass the old darky's, and head so as to cross Pumpkin Creek half-way between the Verdigris and the trading-post" (before alluded to). "I will strike straight from here to the post." Then I said to King, "You know the course to the mouth of Wild Cat; keep straight on it, and if I am not there by the time you are, go to old Mr. McCarmac's on Big Hill and wait for me."

They started up the river. I rode out of the timber and brush that skirted the river and headed straight across the prairie for the trading-post. When a little less than a mile from the place I came in sight of it and noticed a large crowd of men outside the store. I put my horse in a lope, galloped up to them and dismounted, saying, "Hello, boys."

This place was known as the Gokey store. One of the Gokeys came up and shook hands with me (we were quite well acquainted), and he said: "So it was you that passed here last night. I just got in to-day with a load of freight and learned of the trouble just before you came in sight. Where are the other two men?" (He had been told that there were three of us passed his place the night before.) I told him, "I do not know where they are, but I left them opposite the mouth of Onion Creek."

Gokey took me to one side and informed me that there were about twenty of the crowd had provisioned a wagon and were going to Timber Hill to be at the preliminary hearing of the Odens, which was to be held at a log schoolhouse in our township, about one and one-fourth miles south of the justice's residence.

I omitted to state that when the Odens came up to surrender, they brought with them a young man by the name of Powell as witness for the defense. He was the only eye-witness to the killing of Parker, beside the Odens.

When I left the Gokey store, a few minutes after arriving there, the queer feeling of impending danger and trouble came over me, and that serious trouble might yet occur while those two prisoners were still in our charge.

Shortly after crossing the ford at the north and south trail, I struck off across a trackless prairie for the mouth of Wild Cat

Creek. I found on arriving there that King and Oden had crossed and were only a short distance ahead of me. It had become quite dark when I caught up with them. I said, "Look here, Oden, from this on we will have to use the utmost caution for your safety, while you are in my charge. So when we get to Big Hill you two fellows take the hill road and hurry on to Carpenter's, and I'll keep up the creek bottom trail to the schoolhouse and bring some more deputies with me to Carpenter's"; which I did.

I arrived at Carpenter's after midnight, with seven men whom I knew could be depended upon in any emergency. There were now at Justice Carpenter's the two Odens, young Powell, their witness, eight deputies and myself. The time for the trial had been set for 2 P. M. the next day.

When we arrived at the school-house, just before proceedings commenced, we beheld a motley-looking crowd. There were about thirty of the Timber Hill and about fifteen of the Big Hill settlers. Added to these were the twenty-odd men from near the scene of the murder, twenty-five miles away.

There were men dressed in the garb of homespun butternut, a cloth made on the hand-loom of the day. Some were yet wearing their old army uniforms, the well-known sky-blue trousers, navy-blue blouse, with brass buttons with the American eagle on them, the blue overcoat with the long or short cape,—a distinction between an ex-cavalryman and ex-infantryman. Others were there toggled out in the then up-to-date store clothes and "biled" shirt. The horses were tied to wagons in front of the schoolhouse, on the open prairie and to trees in the rear. Camp-fires were burning in different places, on each side and behind the house.

These men were walking arsenals. Nearly all were carrying two six-shooters, and among them were rifles of many different patterns. One man could be seen with a long-barreled Hawkins rifle, while his neighbor carried an army Enfield, one a Springfield, and one man an old brass-bound American musket. Some had the Gal-lagher, some the Spencer, and some carried Sharp's carbine.

Not a man was there through idle curiosity, but either to kill the Odens or see fair play. It was learned afterward that the twenty

men who had come up from Gokey's had held a council just before they came to the schoolhouse and had decided that, in killing the Odens on that trip, they might have to kill others and at the same time sacrifice some of their own lives. They decided not to use one bit of testimony they had for the State. Simply let the whole thing go by default and bide their time.

So the trial came off—or rather, the hearing. Bill Oden, the first witness after young Powell had given his forced-by-threat testimony, stated to the jury that it was very unfortunate that he had killed the young man; that he only intended to disable him so that he could do no harm; had struck with the handspike a harder lick than he had intended. Tom Oden said that Parker had murder in him when he came to the cabin; that he tried to reason with him, to no purpose; that had his brother not struck him with the spike before he shot the second time—he claimed Parker had shot at his brother once; but Powell afterwards stated that was false—that he, Parker, might have killed all of them. And all this time not a protest; while on the other hand, the Odens had made out a clean case of self-defense.

The jury brought in, from under the boughs of an oak tree out in the wood, a verdict, "Guilty of an excusable homicide." Thus closed one of the greatest farces of a trial in jurisprudence.

*A few days after the Odens returned home they were literally bullet-riddled by a determined party of men, some thirty in number, starting from Chetopa and augmenting until Gokey's trading-post was reached.*

### 103. Trial by Jury in Early Mining Days in Colorado.<sup>1</sup>

#### *Jurors Challenged who have not already Killed their Man.*

[The author, an Englishman, came out to Colorado as a mining engineer. His account of life in the earlier mining-camp days records his own observations.]

1. From *Herbert W. L. Way*, "Round the World for Gold", Sampson, Low, Marston & Co., London, 1912, p. 45.



The Town of Rico was getting a very tough name at this time. Shortly afterwards I was standing in the street in the town when I heard a shot in the saloon behind me, and going in to see what was the cause, I found two men struggling on the floor. One scrambled to his feet while the other lay like a log, and was lifted upon the faro table. A doctor was sent for immediately, and on his arrival he ripped off the man's clothes and found a hole right through him. The bullet had entered his stomach, had gone out on one side of his spine, and he died almost as soon as the doctor arrived. The sheriff came in a few minutes and made the other man, Fay, his prisoner.

It appeared that the two men were miners on the Enterprise who had walked down from the mine together, as they did almost daily, and had entered the saloon, where they had a drink together. Fay then went off, had a wash and a change of clothing, and came back to the saloon, where he found his friend still at the bar in his working clothes, with his mine hat caked with mud and candle grease. Seeing Fay enter in his respectable clothes, with black wide-awake hat on, he jocularly exchanged hats, when Fay, who was a sullen sort of chap, lost his temper and demanded his own hat back instantly, throwing the other hat upon the floor. As it was not returned, Fay went across the road to a hardware store, purchased a Colt's forty-four six-shooter and a box of cartridges, and loaded the six-shooter in the store. He then went back to the saloon, and getting the drop on his friend, he demanded his hat back at once or he would shoot. His friend, after making reflections on Fay's mother, said, "Fire away; you haven't pluck enough." However, Fay pulled the trigger, shooting his friend clean through the body; but before the friend fell he rushed at Fay, who was a big man, seized him, and both men fell to the ground together.

When the trial came on, Fay's lawyer objected to any juryman who had not killed his man previously. He then made a magnificent speech, marching up and down the court-room with his hands deep in his trousers pocket, chewing a big cigar all the time, and saying that any man who made reflections on another man's mother as the dead man had done, deserved to be shot every time,—

ignoring the fact that these reflections were in daily and hourly use by nine miners out of ten, as terms of endearment.

The jury, after a few minutes' consultation, said Fay had done the only thing an honourable man could do in protecting the honour of his maternal parent, and he left the court without a stain on his character.

#### 104. The California Alcalde in the Gold-Rush Period.<sup>1</sup>

##### *Horse Sense without Technicalities.*

The most notable characters of the olden times were, perhaps, the American Alcaldes. The office of Alcalde, as has been already shown, was that of a magistrate and justice of the peace under the Spanish and Mexican law; and in California there could hardly be said to be any other judicial tribunals than those held by Alcaldes. After the American occupation the name of Alcaldes as judicial officers continued; but the jurisdiction, which even in Mexican times was very indefinite and therefore very extensive, was almost illimitably extended, so as finally to embrace almost everything that the officer could claim. . . . One of the characteristics of these irresponsible officers was their roughness and disregard of everything like the amenities of life. It was their boast that they were endowed with common sense or "horse sense," as they usually expressed it, and that they could not be cajoled by technicalities or refinements of reasoning. . . .

In the neighboring town of Columbia, where very soon after its settlement in the spring of 1850 there were about six thousand inhabitants and one hundred and forty-three faro banks in operation, the general lawlessness occasioned a public election, which resulted in the choice of an individual, known as Major Sullivan, as Alcalde. He was charged with having had a regular system of swindling everybody with whom he had dealings; and though this charge may not have been entirely true, it seems certain that he always managed to get large fees and not always from the proper

1. From *Theodore H. Hittell*, "History of California", vol. III, p. 222, San Francisco, Stone & Co., 1897.

parties. One of his first cases was that of a Mexican charged with stealing a pair of leggings. The accused was convicted and fined three ounces for the stealing, while the prosecuting witness was mulcted one ounce for troubling the court with the complaint. On another occasion a man brought suit for a mule. He proved his property and the defendant was ordered to restore it and pay one ounce fine and three ounces costs. As, however, he did not have the money and it could not be made out of his hide, Sullivan ordered the plaintiff to pay the fine and costs, for the reason that the Court could not be expected to sit without remuneration!

There was sometimes a grain of grim humor in the American Alcaldes, which was well illustrated in the following incident that appears to have taken place in one of the northern mining camps. In the autumn of 1849 a tall, handsome young fellow, dressed in a suit of fine broadcloth and mounted on a splendid horse, stole a purse of gold-dust from the cabin of an honest miner and disappeared. As soon as the fact became known, the loser and several of his friends went in pursuit of the thief. It being ascertained that he had taken the main road that led around a high mountain, his pursuers cut across by a trail which was much shorter than the road, and overhauling the young man took him before the Alcalde. That officer, after patiently listening to the testimony, quietly said to the prisoner, "The Court thinks it right that you should return that purse of gold to its owner." To this the culprit readily assented and handed it over. The Alcalde next remarked, "The Court thinks you ought to pay the costs of the proceedings." To this also the culprit made no objection, evidently thinking he was very fortunate to get off so easily, and inquired the amount. Being informed the costs were two ounces of gold-dust, he cheerfully produced and paid that sum. "And now," continued the alcalde, with a twinkle in his eye, "there is another part of the sentence of this Court that has not yet been mentioned; and that is, that you receive thirty-nine lashes on your bare back, well laid on!" The wheels of justice moved much quicker in those days than in these; and long before night-fall that young man had occasion to be sorry.

## *Chapter 21*

# *CITIZENS' SELF-ORGANIZED JUSTICE*

## CITIZENS' SELF-ORGANIZED JUSTICE

[Introductory. (3) The *third* typical situation (see above, Introduction to No. 97) arose in the regions west of the Mississippi,—before 1849, where the hardy fur-traders had established numerous posts, and after 1849, when the gold-rush had lured thousands of wealth-seekers, in California, Nevada, and Colorado, and later in Alaska. There were for a long period no organized local governments. But now was seen a remarkable spectacle,—the universal self-organized justice of the citizens, without waiting for authority of law. This spectacle so impressed Bayard Taylor, the cultured world-traveler, that in 1850 he wrote of it (*post*, No. 109) "The capacity of a people for self-government was never so triumphantly illustrated". From San Diego to Alaska, from Missouri to California, in trading-post or mining camp or on the covered wagon trail, whenever disorder and ruffianism began to threaten anarchy, the body of citizens met and organized informal courts of justice, with hearings of the parties, examination of witnesses, and prompt execution of penalties, without appeal.

This of course was far different from "lynch law", in its inferior sense of mob-law. The requisite elements of a just trial were all present, informally but essentially. It was organized justice simplified.

Does this social phenomenon point back to some acquired sense calling for the administration of justice, in all men who come from "civilized" communities? Or was it merely a product of the Anglican traditions of law and order which these pioneers had left behind in the East? Or was it simply a gesture of self-protection by the strongest, in defence of their acquired and hoped for wealth? It is indeed chronicled also in the annals of pioneering in Australia, yet not in those of Latin America. But that it cannot be ascribed merely to Anglican traditions may be seen from its re-appearance among the Arctic fur-hunters of Northern Siberia (*ante*, Chap. 16,

## Chapter 21

105. *Origin of the Term "Lynch Law".*
106. *Citizens' Self-Organized Justice in the Early Southwest.  
The Regulators Lash and Banish.*
107. *Judicial Self-Government at a Far-Flung Trading Post on the Missouri.  
Hanging commuted to Lashes.*
108. *Justice at a Miners' Meeting in Pioneer Alaska.  
Exiling the Culprit to Frozen Death.*
109. *Self-Organized Justice in Early California.  
The People's Elected Tribunals.*
110. *The Mining Camp Vigilantes of California.  
Cutting Off the Ears to Identify a Thief.*
111. *The San Francisco Vigilance Committee of 1856.  
The Hanging of Casey and Cora.*
112. *The Kangaroo Courts of the County Jails.  
The Lawless find that they need Law.*

No. 71) where the impulse obviously could not be attributed to an Anglican origin. The analysis of its origin certainly invites speculation for the historian and the social psychologist.

The following selections illustrate variant phases of this institution in different regions.]

#### 105. Origin of the Term "Lynch Law".<sup>1</sup>

[The author, after noticing but discarding several origins attributed to the term, proceeds to describe the Virginia incidents which gave rise to its nation-wide vogue:]

We now come to the explanation of the origin of the term which has been most frequently given and which was for years accepted without question. It is to the effect that lynch-law originally had reference to the kind of law administered by Charles Lynch, in Virginia, during the latter part of the Revolutionary War. . . .

The records of the court of Bedford County, the minutes of various Quaker meetings, the journals of the Virginia House of Burgesses and of the first Constitutional Convention, taken together with family documents and traditions, show Charles Lynch to have been a thoroughly capable and highly respected man, a leader among the men in his community. . . . The movement for independence had from the first a great many opponents in the mountainous sections of Virginia, and there was a considerable number of Tories in Bedford County, where Charles Lynch lived. The unsettled condition of affairs also led many desperadoes to resort to this section of Virginia. Both Tories and desperadoes harassed the Continentals and plundered their property with impunity. The prices paid by both armies for horses made horse-stealing a lucrative practice, and the inefficiency of the judiciary made punishment practically out of the question. The County Courts were merely examining Courts in all such cases, and the single Court for the final trial of felonies sat at Williamsburg, more

1. From *James Elbert Cutler*, "Lynch Law: an Investigation into the History of Lynching in the United States", New York, Longmans, Green & Co., 1905, p. 23.

than two hundred miles away. To take the prisoners thither, and the witnesses necessary to convict them, was next to impossible. Frequently the officers in charge of prisoners would be attacked by outlaws and forced to release their men, or be captured by British troops and themselves made prisoners.

It was under these circumstances that Colonel Lynch conferred with some of his neighbors as to what was best to be done. After deliberation they decided to take matters into their own hands, to punish lawlessness of every kind, and so far as possible restore peace and security to their community. For the purpose of attaining these ends they formed an organization, with Mr. Lynch at the head. Under his direction suspected persons were arrested and brought to his house, where they were tried by a Court composed of himself, as presiding justice, and his three neighbors, William Preston, Robert Adams, Jr., and James Callaway, sitting as associate justices.

The practice of this Court was to have the accused brought face to face with his accusers, permit him to hear the testimony against himself, and to allow him to defend himself by calling witnesses in his behalf and by showing mitigating and extenuating circumstances. If acquitted, he was allowed to go, "often with apologies and reparation." If convicted, he was sentenced to receive thirty-nine lashes on the bare back, and if he did not then shout "Liberty Forever," to be hanged up by the thumbs until he did so. The execution of the sentence took place immediately upon conviction. The condemned was tied to a large walnut tree standing in Mr. Lynch's yard and the stripes inflicted—with such vigor, it is said, that even the stoutest hearted Tory shouted for "Liberty" without necessitating a resort to further punishment.

The news of the invasion of Virginia by Cornwallis gave the Bedford Tories strong encouragement, and a conspiracy was formed to overthrow the county organization and seize, for the use of Cornwallis on his arrival, the stores that Lynch had collected for Greene's army in North Carolina. The conspirators' plans, however, became known to Colonel Lynch, tradition says through one of their own number, and he had them all arrested. . . .

After careful deliberation, Colonel Lynch, as the presiding justice, sentenced them to terms of imprisonment varying from one to five years. Robert Cowan, who had formerly been a fellow justice on the county bench and who seems to have been the ringleader, was sentenced to a year's imprisonment and a fine of £20,000. . . .

After the war, therefore, the Tories who had suffered at his hands threatened to prosecute Colonel Lynch and his friends. To avoid lawsuits and as a means of finally settling the affair, Lynch brought the whole matter before the Virginia Legislature. After a lengthy debate, which, according to Mr. Page, "aroused the interest of the whole country," the following Act was passed in October, 1782 [indemnifying the parties from all liability]. . . .

The old walnut tree on which lynch-law is said to have been first administered was still standing, in 1900, on the lawn of the Lynch homestead, two miles from the village of Lynch Station on the Southern Railway.

#### 106. Citizens' Self-Organized Justice in the Early Southwest.<sup>1</sup>

##### *The Regulators Lash and Banish.*

[The narrator is an Englishman who is describing his tour in 1822 through Indiana, Illinois, and Missouri:]

After leaving Carlyle, I took the Shawnee town road, that branches off to the S. E., and passed the Walnut Hills, and Moore's Prairie. These two places had a year or two before been infested by a notorious gang of robbers and forgers, who had fixed themselves in these wild parts, in order to avoid justice. As the country became more settled, these desperadoes became more and more troublesome. The inhabitants therefore took that method of getting rid of them, that had been adopted not many years ago in Hopkinson and Henderson counties, Kentucky, and which is absolutely necessary in new and thinly settled districts, where it is almost impossible to punish a criminal according to legal forms.

1. From *W. N. Blane*, "An Excursion through the United States and Canada, 1822-1823", p. 233 (London, 1824), as quoted in *J. E. Outler*, "Lynch Law", p. 79.

On such occasions therefore, all the quiet and industrious men of a district form themselves into companies, under the name of "Regulators." They appoint officers, put themselves under their orders, and bind themselves to assist and stand by each other. The first step they then take is to send notice to any notorious vagabonds, desiring them to quit the State in a certain number of days, under the penalty of receiving a domiciliary visit. Should the person who receives the notice refuse to comply, they suddenly assemble, and when unexpected, go in the night time to the rogue's house, take him out, tie him to a tree, and give him a severe whipping, every one of the party striking him a certain number of times.

This discipline is generally sufficient to drive off the culprit. But should he continue obstinate, and refuse to avail himself of another warning, the Regulators pay him a second visit, inflict a still severer whipping, with the addition probably of cutting off both his ears. No culprit has ever been known to remain after a second visit. For instance, an old man, the father of a family, all of whom he educated as robbers, fixed himself at Moore's Prairie, and committed numerous thefts, &c. &c. He was hardy enough to remain after the first visit, when both he and his sons received a whipping. At the second visit the Regulators punished him very severely, and cut off his ears. This drove him off, together with his whole gang; and travellers can now pass in perfect safety where it was once dangerous to travel alone.

There is also a company of Regulators near Vincennes, who had broken up a notorious gang of coiners and thieves who had fixed themselves near that place. These rascals, before they were driven off, had parties settled at different distances in the woods, and thus held communication and passed horses and stolen goods from one to another, from the Ohio to Lake Erie, and from thence into Canada or the New England States. Thus it was next to impossible to detect the robbers, or to recover the stolen property. . . .

This practice of *Regulating* seems very strange to an European. I have talked with some of the chief men of the Regulators, who all lamented the necessity of such a system. They very sensibly remarked, that when the country became more thickly settled, there

would no longer be any necessity for such proceedings, and that they should all be delighted at being able to obtain justice in a more formal manner. I forgot to mention, that the rascals punished have sometimes prosecuted the Regulators for an assault. The juries however, knowing the bad characters of the prosecutors, would give but trifling damages, which divided among so many amounted to next to nothing for each individual.

107. Judicial Self-Government in a Far-Flung Trading Post, on the Missouri, A.D. 1838.<sup>1</sup>

*Hanging commuted to Lashes.*

[Fort Union was the name given to a trading-post of the American Fur Company (founded by John Jacob Astor) located on the Upper Missouri, near the junction of the Yellowstone River. Built in 1829 by Kenneth McKenzie, manager of the company's trade and known as "the king of the Missouri", it became the headquarters of the trade in that region. The fort was constructed in blockhouse style, with walls, gates, bastions, storehouses, and bunk-houses for the staff. A large staff of traders, clerks, etc., some of them with squaw families, was accommodated within the fort.

The narrator was one of the leading traders on the Company's staff, and he is telling of the arrangements for doing justice within this self-governing community.]

Thanks to kind Providence, here I am again in good old Fort Union, at a splendid table, with that great prairie appetite to do it justice. The day after my arrival I was reinstated in charge of the liquor shop, and as it was the height of the meat trade I had enough to do, night and day.

Excepting plenty of buffalo, deer, and rabbit hunting, nothing took place worth mentioning until Christmas [1838]. On this anniversary a great dinner is generally made, but that was never the case here, as it was always taken out in drinkables instead of eatables; and I, who did not drink, had to do without my dinner.

1. From "Forty Years a Fur-Trader on the Upper Missouri; the Personal Narrative of Charles Larpenteur, 1832-1872", ed. Milo Milton Quaije; Chicago, Lakeside Press, R. R. Donnelley & Sons Co., 1933, p. 134.

At the height of the spree the tailor and one of the carpenters had a fight in the shop, while others took theirs outside, and toward evening I was informed that Marseillais, our hunter, had been killed and thrown into the fireplace. We immediately ran in, and sure enough, there he was, badly burned and senseless, but not dead yet. We were not at first sure whether this was the mere effect of liquor, or had happened from fighting; but we learned that a fight had taken place, and on examination we found that he had been stabbed in several places with a small dirk. Knowing that the tailor had such a weapon, we suspected him and demanded it. He was at the time standing behind his table; I saw him jerk the dirk out of his pocket and throw it under the table. I immediately picked it up; it was bloody, and from its size we judged it to be the weapon with which the wounds had been inflicted. Having learned that the carpenter had also been in the fight, they both were placed in irons and confined to await their trial.

As such Christmas frolics could not be brought to a head much under three days, the trial took place on the fourth day, when a regular court was held. Everything being ready, the criminals were sent for, the witnesses were well examined, and after a short session the jury returned a verdict, "Guilty of murder." The judge then pronounced sentence on the convicted murderers, which was that they be hanged by the neck, until they were "dead, dead, dead!" But, not considering it entirely safe to have this sentence executed, he changed it to thirty-nine lashes apiece. John Brazo was appointed executioner. Always ready for such sport, he immediately went in quest of his large ox-whip, and, not making any difference between men and oxen, he applied it at such a rate that Mr. Mitchell, the judge, had now and then to say, "Moderate, John, moderate"; for had John been suffered to keep on, it is very likely that the first sentence would have been executed.

108. Justice at a Miners' Meeting in Pioneer Alaska.<sup>1</sup>*Exiling the Culprit to Frozen Death.*

Circle City was unique in some ways, and for more than one reason. Here was a town made up of men from all parts of the world, intelligent men all. . . . Here was a town of some three or four hundred inhabitants, which had no taxes, courthouses, or jail; no post-office, church, schools, hotels, or dog pound; no rules, regulations, or written law; no sheriff, dentist, doctor, lawyer, or priest. Here there was no murder, stealing, or dishonesty, and right was right and wrong was wrong as each individual understood it. Here life, property, and honor were safe, justice was swift and sure, and punishments were made to fit the case. . . .

Circle City and the surrounding country was governed by what were called "Miners' Meetings." (The Canadian Government, on its side of the line, had sent a bunch of North-West Mounted Police into Forty-Mile in '95, who were governing that section.) In Circle City all ordinary disputes and misunderstandings, one case of stealing, a breach of promise case, and one homicide, were settled by Miners' Meetings. The last meeting was held in the fall of '97, and it was the last place, as far as I know, where this procedure was acknowledged by the United States Government. The verdict of these meetings was final, and no money was involved on either side for court expenses. The man or men calling the meeting posted a notice stating what it was called for, and it was usually held immediately. A chairman who acted as judge, and a clerk of court to take the minutes, were chosen. Then the plaintiff stated his case and produced witnesses, and the defendant replied and produced his witnesses.

In these trials the past reputation of a witness and sometimes of a principal were brought up; that is, if a man was known to be a liar or a truthful man his statements were accepted accordingly.

1. From *Arthur Treadwell Walden*, "A Dog-Puncher on the Yukon", Boston, Houghton Mifflin Co., 1928, Chap. IV, pp. 44, 55, by permission of the publishers.

As one man expressed it to me, "What is the use of leading a good honorable life if a man doesn't get the credit for it when he gets into a scrape?" After the witnesses had been produced and examined, any one in the room could ask questions. At the end the case was summed up by the chairman and its merits discussed by any one who wished to do so. When every one was talked out, a division of the house was called for; the verdict of the majority was accepted and that was the END. . . .

Such was Circle City, the last stand of the Miners' Meetings.

Back in the summer of '96 an interesting event took place. There was a man in Circle City who had been in the country fourteen years and had come from Montana, where in his younger days he had hunted the last of the buffalo. But having killed a man there, he left the country and came to Alaska, gradually working his way into the interior. He was in no way a bad man in the present sense of the word, but being a product of the early West he was a law unto himself. He was not in the least quarrelsome; in fact we always found him very good-natured; you could play almost any trick or joke on him and he would not take offense. But any insult he resented, as in the early days when the West was wild. He was absolutely honest, and a great respecter of women, although he knew very few. I shall call this man Stanley, as he is still alive.

There was another man in Circle City whom I shall call Higgins. He had a very bad disposition and was generally feared when he was liquored up. Guns were not packed at that time, for everybody had to carry his stuff by dog-train in the winter and on his back in the summer, and a six-pound gun meant two days' rations. Also the climate was against quarreling.

As it happened, Stanley and Higgins got into a row, and as they were not fist-fighters they ran for their cabins to get their revolvers. Stanley getting out first, Higgins took a crack at him through his window, shooting through the glass and missing him. Then Stanley ran around behind Higgins's cabin, pulled out the moss from between the logs, squinted in, and, seeing nothing but Higgins's legs he creased him across the calf, not doing him any harm.

There had been a duel in Circle City the year before, and the Canadians at Forty-Mile had made cracks about the lawlessness on the American side. The men of Circle City, not wanting to justify this name, called a Miners' Meeting on these two men to stop their fighting. This Miners' Meeting was held in Jack McQueston's trading post, a log building over a hundred feet long. A chairman and clerk of court were chosen as usual; but proceedings came to a halt because neither man would make an accusation against the other.

Some men spoke of their shaking hands and making it up, some wanted to see a fight and kept quiet. But the majority didn't know what to do, until Higgins, stepping out from his side of the room said, "If Mr. Stanley will come outside with me, we will settle this difficulty with no trouble to any one." This was responded to by a stampede to the door by the two principals. It was the old idea of the "drop", where the first man outside would shoot the other as he came out.

Jim Belcher, the chairman, then distinguished himself by jumping out of his seat, and snapping out like the crack of a whip, "Come back, gentlemen!" The order was obeyed, just as two setter dogs obey the command of their master. Stanley and Higgins walked up the room like two church deacons coming up with the plate, step and step, with their hands on their hips and their eyes on each other, and in front of what might have been the chancel they backed off to each side of the room.

From now on the proceedings became dramatic. The chairman gave up his chair to another man, and addressed the meeting. "Mr. Chairman and Gentlemen! I make a motion we let these two men fight. If one is killed, we will give him Christian burial; if both are killed we will give them both Christian burial. But if one survives, we'll hang him!"

Another man took the cue, and stepping forward said, "I'll make the amendment that if either man is found dead under suspicious circumstances, the other shall be hung without trial." Unanimous verdict.

Then Higgins stepped forward and said, "I'll not fight under any such conditions as these, as I know I'll kill Stanley and I don't want to get hung."

This ended the trial. But to my own knowledge these two men met each other on the sixty-five-mile trail to the mines and no harm came of it. Each man knew that if either "turned up missing," the other would be hanged. And I actually believe that if either man had fallen down a prospect hole or into the Yukon, the other would have pulled him out. Yet each hoped for the other's death by some means or other not traceable to him. They were brave men both, yet each was always afraid the other would either forget or take the chance.

Later, Higgins got into a row with Kronstadt, a bar-tender, and, sending him warning through his friends that he was going to kill him, appeared in the doorway of the saloon with his uplifted gun. Kronstadt instantly drew his gun from under the bar, and, instead of raising it, fired from the level of the bar, striking his man under the eye, the bullet going out through the back of his head. By shooting in this way, he gained a fraction of a second on his opponent.

Immediately afterwards, Kronstadt wrote his own notice out, calling a Miners' Meeting on himself, walked across to the trading post, pinned it up, and everybody followed him in. He was tried and acquitted in twenty minutes. Of course the ban was off Stanley, owing to Higgins's death, and to celebrate he deposited all the "dust" he had with the saloon-keeper: it was free drinks for all as long as it lasted. Then he put on his best clothes and went to the funeral. . . . .

The one case of stealing in the country happened in this way. Men were in the habit of poking out into the wilderness in the winter, prospecting, leaving caches on the way out to use on the way back. These caches were sacred, as men's lives depended on them; but a destitute man finding one was allowed to use it, provided he replenished it as soon as possible. If he were unable to do this himself, some one else would always do it for him.



The man in question found a cache, took what he wanted, threw the rest on the ground so that it was destroyed by animals, and failed either to replenish it or to report it on his return to town. The owner, coming back, probably sooner than was expected, picked up the man's trail and just managed to get in. He found out who had robbed his cache, but waited several days to give the man a chance, and then laid his grievance before the camp.

A Miners' Meeting was called and the thief acknowledged his guilt. The unwritten law for an offense of his kind was death. But, as everybody in camp would have to put his hand on the rope and help hang him, a compromise was arrived at whereby the man was given his choice of being hanged or taking a hand-sled, without dogs, and leaving for the outside over the ice. Being a white man he chose the latter course. An Indian would have seen the hopelessness of it and chosen to be hanged.

The morning he pulled out, everybody came out to bid him good-bye, and ask if there was anything they could do to help him, and wished him the best of luck and shook hands all round. He could be seen for about six miles, till he rounded a bend in the river, the speck getting smaller and smaller as he made his way up. It was early in the season and the river was partly open, making traveling very rough and difficult. What the man's thoughts were, God alone knows. Two men coming back down the Stewart River, where they had been prospecting the summer before, met him three hundred and seventy-five miles above Circle City, and were able to spare him some dried moose meat. Not knowing anything about the meeting, they tried to get him to go back with them, which of course he refused. Had he got out, we should have heard of it from some of the men who came in from Dyea next spring.

#### 109. Self-Organized Justice in Early California.<sup>1</sup>

##### *The People's Elected Tribunals.*

[The narrator—America's most famous literary traveler of the last century—went to California in June, 1849, in the early days

1. From *Bayard Taylor*, "El Dorado, or, Adventures in the Path of Empire, comprising A Voyage to California," etc.; New York, G. P. Putnam, 1862, 18th ed. p. 99.

of the gold-rush, traveling via the Isthmus of Panama, landing in San Francisco, and then going up to the mining regions, where his observant eye gathered data for his book. His conclusions, in the chapter entitled "Some Words on Law and Society," were as follows:]

The history of law and society in California, from the period of the golden discoveries, would furnish many instructive lessons to the philosopher and the statesman. The first consequence of the unprecedented rush of emigration from all parts of the world into a country almost unknown, and but half reclaimed from its original barbarism, was to render all law virtually null, and bring the established authorities to depend entirely on the humor of the population for the observance of their orders. The countries which were nearest the golden coast—Mexico, Peru, Chili, China and the Sandwich Islands—sent forth their thousands of ignorant adventurers, who speedily outnumbered the American population. Another fact, which none the less threatened serious consequences, was the readiness with which the worthless and depraved class of our own country came to the Pacific Coast. From the beginning, a state of things little short of anarchy might have been reasonably awaited.

Instead of this, a disposition to maintain order and secure the rights of all, was shown throughout the mining districts. In the absence of all law or available protection, the people met and adopted rules for their mutual security—rules adapted to their situation, where they had neither guards nor prisons, and where the slightest license given to crime or trespass of any kind must inevitably have led to terrible disorders. Small thefts were punished by banishment from the placers, while for those of large amount or for more serious crimes, there was the single alternative of hanging. These regulations, with slight change, had been continued up to the time of my visit to the country. In proportion as the emigration from our own States increased, and the digging community assumed a more orderly and intelligent aspect, their severity had been relaxed, though punishment was still strictly administered for all offences. There had been, as nearly as I could learn, not more than twelve

or fifteen executions in all, about half of which were inflicted for the crime of murder. This awful responsibility had not been assumed lightly, but after a fair trial and a full and clear conviction, to which was added, I believe in every instance, the confession of the criminal.

In all the large digging districts, which had been worked for some time, there were established regulations, which were faithfully observed. Alcaldes were elected, who decided on all disputes of right or complaints of trespass, and who had power to summon juries for criminal trials. When a new placer or gulch was discovered, the first thing done was to elect officers and extend the area of order. The result was, that in a district five hundred miles long, and inhabited by 100,000 people, who had neither government, regular laws, rules, military or civil protection, nor even locks or bolts, and a great part of whom possessed wealth enough to tempt the vicious and depraved, there was as much security to life and property as in any part of the Union, and as small a proportion of crime. The capacity of a people for self-government was never so triumphantly illustrated. Never, perhaps, was there a community formed of more unpropitious elements; yet from all this seeming chaos grew a harmony beyond what the most sanguine apostle of Progress could have expected.

The rights of the diggers were no less definitely marked and strictly observed. Among the hundreds I saw on the Mokelumne and among the gulches, I did not see a single dispute nor hear a word of complaint. A company of men might mark out a race of any length and turn the current of the river to get at the bed, possessing the exclusive right to that part of it, so long as their undertaking lasted. A man might dig a hole in the dry ravines, and so long as he left a shovel, pick or crowbar to show that he still intended working it, he was safe from trespass. His tools might remain there for months without being disturbed. I have seen many such places, miles away from any camp or tent, which the digger had left in perfect confidence that he should find all right on his

return. There were of course exceptions to these rules—the diggings would be a Utopia if it were not so—but they were not frequent. . . .

Abundance of gold does not always beget, as moralists tell us, a grasping and avaricious spirit. The principles of hospitality were as faithfully observed in the rude tents of the diggers as they could be by the thrifty farmers of the North and West. The cosmopolitan cast of society in California, resulting from the commingling of so many races and the primitive mode of life, gave a character of good-fellowship to all its members; and in no part of the world have I ever seen help more freely given to the needy, or more ready cooperation in any humane proposition.

#### 110. The Mining Camp Vigilantes of California.<sup>1</sup>

##### *Cutting Off the Ears to Identify a Thief.*

In the entire absence of anything like authoritative law or duly constituted judicial tribunals on the plains, the emigrants were compelled, as has been stated, to resort to what was ordinarily called lynch-law. Properly speaking the term "lynch-law" applied only to the kind of law that is administered in a summary manner by irresponsible and irregular tribunals in places where regular courts exist and in opposition to them. . . . But on the plains there were no laws to invoke and no tribunals to appeal to; so that there was a very marked difference between trials held and punishments inflicted by the emigrants after leaving Missouri and before reaching California and those of other times and places when and where there were laws and courts in abundance. All irregular and illegal proceedings of the kind, however, without distinction got in a short time to be called after the name of Lynch. . . .

The most instructive and in many respects the most significant occurrences of the early mining times—and those which exhibit in the strongest light the characters of the old miners and their efforts, blind and ill-advised as they often were, to administer jus-

1. From *Theodore H. Hittell*, "History of California", vol. III, p. 241, San Francisco, Stone & Co., 1897.

tice and secure order—were the irregular, spontaneous and sometimes violent proceedings known as cases of lynch-law, mob rule or vigilance committee work. . . .

One of the first cases appears to have taken place in the latter part of 1848 and in the neighborhood of the Calaveras river. A sailor, who had deserted from the ship *Ohio* and gone into the Southern Mines, undertook one night to rob an ex-volunteer of the army, who had set up a drinking shop. He had secured two bags, containing about five thousand dollars worth of gold; but, in trying to remove a third, which was half full of silver dollars, the jingling of the coin awoke the owner. The latter at once sprang up and gave the alarm; and, after a hot pursuit, the thief was captured and securely bound to a tree, that being the best method which could be devised at the time for securing him. In the morning a meeting of the miners of the immediate neighborhood was called; and they swore in one of their number, named Nuttman, as judge and twelve others as jurymen to try and dispose of the case. There was of course no doubt of the guilt of the accused; and he was found guilty and sentenced to be hanged. But there was considerable opposition on the part of some of the miners to depriving a fellow creature of life; and, upon the suggestion of a milder punishment, it was determined that the culprit should receive a hundred lashes on his bare back and have his ears cut off and his head shaved, so that he might be everywhere recognized in the mining districts as a felon.

This modification of the sentence gave general satisfaction. The poor wretch was at once triced up by tying his hands to branches of the tree; and some of the miners proceeded to shave off his hair, while others set to work manufacturing lashes. His feet were then tied to the foot of the tree and, when his head had been shaved, a doctor lopped off his ears. He bled profusely; but no sooner was the flow of blood staunchcd than the flogging commenced; and it was inflicted without missing a lash. He was then released and kicked out of the camp.

According to the account given of the occurrence by a person who claimed to know the facts, the bleeding man, upon getting

about half a mile distant from and out of sight of the camp, stole a mule and rode over to what were known as the "Calaveras Diggings." There he happened to meet the owner of the mule, who recognized and claimed his property; and the result was a second trial—this time for mule stealing—a conviction, and a sentence to suffer another flogging. But when the Calaveras miners came to strip him, they found his back so shockingly cut up by the lashes he had previously received that they took compassion on him and contented themselves with driving him out of the district, with a caution not to show himself there again; and it appears that the caution was effective. "There's nothing"—added the narrator, who was an old volunteer and had been among the first after being discharged from service to rush off to the mines—"There's nothing like lynch-law, after all. It's so prompt and so effectual!" . . .

Rough and Ready in Nevada county presented one of the first instances of a vigilance committee, properly speaking. When the place was first settled in April, 1850, there was a great rush of miners to it. In a very short time its inhabitants were to be counted by thousands; and, on account of various thefts, robberies and deeds of violence and outrage, the necessity for some kind of government became painfully apparent. The locality at that time, being before the organization of Nevada county, was within the jurisdiction of Yuba; but there was neither alcalde nor justice nor peace officer of any kind nearer than Marysville, or Nye's Landing as that place was then usually called; and the people of the mountains were certainly not going to go down there to secure a little justice, which they considered within their own reach and possibly of better quality than they would get in the valleys. In view of all the surroundings the community assembled in mass-meeting and appointed a committee of three persons, consisting of H. L. Roberts, James S. Dunleavy and Emanuel Smith, to assume the reins of government as a committee of vigilance and safety. They were to look after the public order and to administer justice; and from their decision there was to be no appeal, except of course to the people from whom they derived their authority. They immediately assumed control and ruled, as was said, with an even and equitable hand. They laid out the town; marked off each man's

premises; appointed a constable; issued writs; heard and determined all disputes concerning mining claims or town lots and all controversies of every kind, calling a jury when the parties desired it; took bonds for appearance from persons charged with offenses, and punished those convicted of crime. On one occasion a man was logged with thirty-nine lashes for stealing, then escorted to the lower edge of the settlement and, with a parting kick, cautioned never to appear in those diggings again upon penalty of death.

#### 111. The San Francisco Vigilance Committee of 1856.<sup>1</sup>

##### *The Hanging of Casey and Cora.*

[When the State of California was admitted to the Union in 1850, the city of San Francisco's population had grown to some 25000. This had all taken place in two years, since the rush of gold-seekers. But the novelty of organizing an effective government under the new American regime had been too much of a task for a community whose dominant aim was to get rich quick. Unpunished crime was plentiful. A Vigilance Committee, during six months of 1851, had acted sporadically, but had then disbanded.

By five years later, in 1856, with a population of 50,000, the conditions of lawlessness had become intolerable. Not only were the burglars, murderers, forgers, gamblers, and bullies rampant, but the government of the city had virtually fallen into their hands; and corruptible judges, sheriffs, and police made it hopeless to bring influential wrong doers to justice. Within those five years, over a thousand homicides had been committed, but only one execution by law had taken place.

By May, 1856, the intolerable situation was brought to a head by two dastardly assassinations in the public street,—the killing of Wm. Richardson, the Federal Marshal, by Charles Cora, a gambler, and the killing, by James Casey, an ex-convict, of James King of William, editor of the "Bulletin" newspaper, who had fearlessly denounced the forces of corruption and violence.

1. From *Theodore H. Hittell*, "History of California", vol. III, p. 511, San Francisco, Stone & Co., 1897.

On the next day, a Vigilance Committee was organized, under the chairmanship of Wm. T. Coleman,—a great leader, and a hero in California annals. Within two days some 2500 members were enrolled, including the principal business men of the city. This time the Committee was to be no ephemeral agency of lynch-law. The organization arranged for the members' strict discipline and regular drill; they were fully armed; and they virtually took and held entire control of the administration of criminal justice for more than a year. By that time the lesson had been taught; a reform People's Party took possession of the city government; and the Committee was disbanded.

But their first act of stern justice had been the trial of Casey and Cora, the assassins. On May 15, the day after the shooting of King, the Committee voted to take Casey and Cora from the jail, and give them a fair trial. An account of the trial follows:]

The trial of Casey and Cora was fixed for May 20 before the Executive Committee; and it was resolved that the decision should be by ballot; that a majority might convict; and that, in case of conviction, it should be reported to the general body of the Committee for approval as a unanimous vote. . . . It was further resolved, in reference to the trials about to take place, that after a trial commenced there should be no recess for more than thirty minutes until it was concluded; that only one person should be allowed to ask questions of the witnesses on their direct examination, though after such examination any member should have an opportunity to make any inquiry or to cross-examine; and that each prisoner should have the privilege of choosing any member of the Executive Committee as his attorney to assist in his defense.

These preliminaries having been arranged, an oath was taken by the Executive Committee to the effect that they pledged their sacred honor to God and each other not to divulge the votes taken in their verdicts to any living being outside their rooms; and thereupon Cora was brought before them and put upon his trial for the murder of Richardson. He chose Miers F. Truett as his attorney; but Truett asked to be assisted by Thomas J. L. Smiley, and it was allowed. At half past one o'clock, soon after the trial com-

Soon after one o'clock, the prisoners were brought to the windows and placed upon the platforms. They were dressed as usual; but their arms were pinioned. Each was accompanied by a priest and each appeared firm. An opportunity was given them to speak.

At a signal from within the building, the ropes holding up the platforms were severed on the roof of the building and the doomed men fell a distance of about six feet. They died apparently without a struggle, only a slight motion of the extremities being noticed.

The bodies hung for an hour, after which they were lowered and taken into the building. The Vigilance companies, which had acted as guards, were then marched, one after the other, into the rooms, where they deposited their arms and were dismissed. Soon afterwards the bodies of the executed men were handed over to the coroner, who held an inquest upon them.

## 112. The Kangaroo Courts of the County Jails.<sup>1</sup>

### *The Lawless find that they need Law.*

[Volumes have been written on the shortcomings of the county jail system in the United States. The short terms of imprisonment,—the neglect and the parsimony of the county governing board,—the non-professional experience of the sheriff in charge, and his distracting variety of duties,—all these have resulted too frequently in a lack of adequate discipline and supervision. Hence grew up a tradition of internal self-government of a rough sort, as an alternative to brutal anarchy.]

A Kangaroo Court (the etymology is obscure) is the non-constitutional court of justice that enforces the rules of behavior framed for themselves by the inmates of a jail. There is a code, handed down from year to year, and this court enforces the code. The sanction is the boycott or the strong arm of the fellow-prisoners. The sheriff, indeed, does sometimes approve the code, though the approval is a circumstance that may raise a question of his liability

1. From *John H. Wigmore*, "The Kangaroo Court", *Illinois Law Review*, 1922, Vol. XVI, p. 397.

for assault committed by a prisoner to enforce obedience to the code, as in *Hixon v. Cupp*, 1897, 5 Okl. 545, 49 P. 927; *Riggs v. German*, 1914, 81 Wash. 128, 142 P. 479; and *Eberhart v. Murphy*, 1920, 110 Wash. 158, 188 P. 17.

The codes of two such courts are here printed. We owe the text to the courtesy of counsel in *Riggs v. German* and *Eberhart v. Murphy*, supra:

### *Kangaroo Court Rules of Yakima Co. Jail, Washington:*

"Rule 1. Any person or persons entering this corridor without the permission of the inmates shall be subject to a fine not to exceed five dollars (\$5.00).

"Rule 2. All persons, immediately upon entering this corridor, must take a bath, boil up and wash his clothes once each week thereafter.

"Rule 3. Any person found, upon entering this corridor, financially unable to pay said fine, shall be subject to work out said fine on the floor, or wash off the bars, as the court sees fit.

"Rule 4. Any person found or caught conspiring or communicating with any officer, in any way that is detrimental to his fellow inmates, shall be met with the severest punishment that the court can inflict.

"Rule 5. When the inmates are called on by friends or attorneys or by the sheriff and his deputies, at the jail, the rest of the inmates shall retire to their respective quarters and order shall be maintained until the visitors depart.

"Rule 6. All inmates shall regard each other with due respect, and this rule shall apply to strangers and visitors who enter the jail.

"Rule 7. Any person found soliciting or interfering with the officers' duties of the Kangaroo Court, shall be severely punished.

"Rule 8. Any person entering a cell of another, and lounging therein without the permission of his fellow inmate, shall be subject to a fine.

"Rule 9. Each inmate after rising in the morning shall immediately sweep his cell and make up his bed.

"Rule 10. It shall be the duty of the sheriff to inspect each cell in the morning, as to its order and cleanliness, and keep all the inmates off the main corridor while the floor duties are being done.

"Rule 11. Any grievance or complaint made by the inmates shall have access to the prosecuting attorney's office for approval.

"Rule 12. Spitting and making unnecessary dirt on the floor will warrant a severe admonition from the court.

"Rule 13. When court is called, every inmate shall attend with due respect, order and courtesy. Talking or making any unnecessary noise will warrant a fine for contempt of court.

"Rule 14. Loud or boisterous language will not be permitted after 10:30 o'clock P. M. Anyone breaking this rule shall be punished or fined or both, as the court may see fit.

"Rule 15. No inmate of this corridor shall communicate with any person or persons through the windows. Anyone breaking this rule shall be severely punished.

"Rule 16. Anyone caught spitting on the outer corridor will be punished by being detailed to floor duty.

"Rule 17. Mop of this corridor must be thoroughly cleaned before being put away, after using in cells or corridor.

"Rule 18. No one can move from one cell to another, or move bedding or articles, without the consent of the sheriff.

"Rule 19. No loafing will be permitted on the main corridor, as it must be kept clean for those who wish to exercise.

"Rule 20. No bathing will be allowed until the floor duties are done.

"Rule 21. Any person found guilty of lying about the amount of money in his possession or in charge of jailor, shall be fined double.

"Rule 22. Friday each inmate shall wash down the bars and walls of his cell and clean the cell in general.

"Rule 23. Any inmate found guilty of striking, of fighting or any way maltreating another inmate, shall be punished by solitary confinement, and shall be subject to a fine, the amount which is left to the discretion of the court.

"Rule 24. All money collected by fines shall be used for purchasing articles most beneficial to the inmates of this corridor.

"Rule 25. Do not use the can for garbage; use the first stool in the toilet. Do not use the second stool in toilet for other than resting.

"Rule 26. Do not gather around the door when visited by the deputies or jailor, and speak to them only on business subjects.

"Rule 27. All the above and foregoing rules shall be rigidly enforced. Anyone found guilty of violating the same shall be subject to punishment according to the gravity of the offense, by work or fines, as the judge of this court shall see fit.

"Rule 28. Anyone who does not abide by these rules will have to answer to the jailor. The Kangaroo Court shall consist of the

following officers: Judge, prosecuting attorney (sheriff is an executive officer, not a court officer). It shall be the duty of the sheriff upon impeachment of any of said officers for disqualification or otherwise to call an election and elect a new officer to fill said vacancy."

The following code is simpler, and presumably represents an earlier type:

*Kittitas County Jail, Ellensburg, Wash.: Rules of the Kangaroo Court:*

"(1) The court must have a sheriff, judge and prosecuting attorney.

"(2) Every person entering this jail is guilty of a misdemeanor and upon conviction is subject to a fine, of not more than two dollars (\$2.00).

"(3) Every cell must be swept and mopped at least once a day.

"(4) All dishes must be washed after each meal.

"(5) Each and every one excepting the 'Mucker' must stay in cells during dishing up of meals.

"(6) The judge can call court whenever he sees fit.

"(7) The use of the toilet is prohibited during meals.

"(8) The throwing of scraps on the floor is strictly against the rules.

"(9) No profane language is allowed during meals.

"(10) Each person must take a bath at least once a week.

"(11) No loud talking after nine o'clock.

"(12) Each and every one must keep their cells clean and free from vermin.

"(13) Re Rule No. 2. All fines to be paid into treasury of Kangaroo Court.

"(14) The jailor will be treasurer of said court.

"(15) The monies paid into said treasury can be checked against by judge for tobacco, etc., to be distributed among all prisoners. The above rules to be strictly enforced by the judge. . . .

"(16) Each and every inmate must take a bath immediately after entering said jail.

"(17) No spitting in sink at any time."

It is apparent, from this phase of legal life, that even to those who have not lived according to the law of the land, the need of law for their own community becomes obvious.

*Chapter 22*  
*SUNDRY TRIBUNALS*

## SUNDRY TRIBUNALS

113. Justice in the Burgomasters' Court of New Amsterdam, A.D. 1655.<sup>1</sup>

*The Culprit must publicly ask Pardon of God and Justice.*

[Between the years A. D. 1623 and 1664 (when British rule arrived) the Netherland Province of New Netherland (later New York) was governed by a Director-General and Council, with all powers. Local trial justice in the town of New Amsterdam (having some 10,000 population) was administered by a Court consisting of one or more Burgomasters, sitting with four or five Schepen and aided by a Schout.

The Schepen were select citizens acting as lay assessors and holding office permanently,—the successors of the Germanic *scabini* of Emperor Charlemagne's time, the Schoeffen in Germany, the Echevins in France, and other representatives of the old Germanic assembly.

The Schout was a unique official,—primarily a sheriff, and also prosecuting officer, but sitting with the Court though not voting, and sometimes overruled by the others, as shown in the present case.

Peculiar features of the procedure were (1) a fine opening prayer, which modern Courts could do well to adopt; (2) a record of the reasons publicly given by each member in deliberating upon the judgment; (3) the order to the culprit to ask pardon of God and Justice.

In the present case two separate charges against the ne'er-do-well accused are tried together, and the zealous prosecutor's harsh demand for banishment is rejected:]

[*Prayer before Meeting.*] O God of Gods! . . . We pray Thee, the Fountain of all good Gifts, make us fit through Thy

1. From "Records of New Amsterdam from 1653 to 1674, A. D.", including Minutes of the Court of Burgomasters and Schepens; translated and edited by *Berthold Fernow*, 7 vols., New York, Knickerbocker Press, 1897; Vol. I, pp. 48, 334, 349.

## Chapter 22

113. *Justice in the Burgomasters' Court of New Amsterdam, A. D. 1655.*  
*The Culprit must publicly ask Pardon of God and Justice.*
114. *The Witchcraft Court of Massachusetts, A. D. 1692.*  
*The Judge afterwards prays God to Pardon the Tragic Error.*
115. *An Army Military Trial of Indians, A. D. 1832.*  
*The Escape of the Accused leaves the Trial a Fiasco.*
116. *Colonel Goethal's Sunday Court in the Panama Canal Zone, A. D. 1911.*  
*Prompt Justice and No Appeal.*



Grace, that we may do the duties imposed upon us faithfully and honestly. Enlighten for this purpose the darkness of our minds, that we may as judges have our eyes on Thy Word, which is a sure guide to simple wisdom. Let Thy Law be the light upon our paths and a lantern for our footsteps, that we may never leave the path of justice. Let us remember, that we hold Court, not of men, but of God, who sees and hears everything. Let respect of person be far from us, so that we may judge the poor and the rich, friends and enemies, inhabitants and strangers, according to the same rules of truth and never deviate from them as a favor to anybody. And whereas gifts blind the eyes of the wise, keep our hearts from greed. Grant, also, that we condemn nobody lightly or unheard, but listen patiently to the litigants, give them time to defend themselves. Thy mouth and word be our counsel. Grant us also the grace, that we may use the power, which Thou hast given us, for the general benefit of the authorities of the church, the protection of the good, and the punishment of the bad. Incline also the hearts of the subjects to dutiful obedience, that by their love and prayers our burden may be lightened. Thou knowest also, oh Lord, that bad and ungodly men usually vilify and speak against Thy holy ordinances, therefore arm us with strength, courage, wisdom and confidence, that we may oppose all sins and bad things earnestly and zealously and fight for truth and justice, until we are dead. . . . Thursday, February 6, 1653, present Martin Krigier, Aarent van Hattem, Poulus Leendersen van die Grift, Maximilyanus van Gheel, Allard Anthony, Willem Beeckman and Pieter Wolfertsen.

[*Public Notice of Meeting.*] Their Honors, the Burgomasters and Schepens of this City of New Amsterdam herewith inform everybody that they shall hold their regular meetings in the house hitherto called the City tavern, henceforth the City Hall, on Monday mornings from 9 o. c., to hear there all questions of difference between litigants and decide them as best as they can. Let everybody take notice hereof. Done this 6th of February, 1653, at N. Amsterdam. Signed (as above except Arent van Hattem).

[*Record of the Trial of Jan van Leyden*] Monday, 9th August 1655. In the City Hall.

Present—the W. Heeren, Cornelis van Tienhoven, Allard Anthony, Oloff Stevensen, Joh. Nevius, Johan. de Peyster, Jacob Strycker and Jan Vinje. . . .

Anna Webber, wife of Wolfert Webber, residing beyond the Fresh Water, being legally summoned by the Schout touching the complaint rendered against the person of Jan van Leyden in manner as follows:—Jan van Leyden coming last Monday, after the Burghery had marched past her fence and gate, as she stood inside, said, “Good evening! Mde van Vincker! Whore! every man’s whore!” Then following her, he took her rail up and came within the fence; scolded as before, and struck her with his gun on her shoulder, and gave her a black eye, which is still seen by the Court. She relates and complains further, that on her premises and in her yard, he struck her on the side with an iron crowbar, so that she lay three days bedridden from the pain. Jan van Leyden further said, that she had earned fl. 7.4 from the gunner in adultery; and also—“I will have my pleasure of you even though it be on the street, before the pigs.”

Jan van Leyden denies having struck her; has witnesses to the contrary; namely, Abram Plancks wife, her two daughters, and two sisters’ daughters and the wife of Augustyn Heermans.

Capt. F. Fyn being summoned by the Schout in the complaint against the person of Jan van Leyden, says, that Jan van Leyden being in conversation with him last Monday about the payment of fl. 25. in the purchase of Cows, struck him in the face, and laid hold of his sword by his side, and that Mr. Willett and others came between them. Asks right and justice. Jan van Leyden demands copy of the complaint to answer thereunto by next Court day. Complainant demands that his witnesses be heard.

Mr. Thomas Willett and Jacob Barents being summoned declare that they heard, Jan van Leyden and Capt. Fyn were last Monday in conversation before the door about some debts, but they did not pay much attention to them for that reason. They heard Capt.

Fyn say to Jan van Leyden, "Had I you in some other place, I should teach you something else;" and thereupon Jan van Leyden struck the aforesaid Fyn with his fist in the face, and seized the sword he carried at his side, whereupon deponent Willett stepped between them, to prevent further difficulty; declaring what precedes to be true and worthy of belief, under offer of Oath, if needs be. Done etc.

The Schout requests, that Jan van Leyden, for the assault committed on the Highway before witnesses on Capt. Fyn, and the force and violence used towards the wife of Wolfert Webber at her place, be placed in confinement in the City Hall and there answer for his conduct. The officer's request was agreed, and he was ordered to institute his action. . . .

[*Trial Continued*] Extraordinary Meeting holden on Tuesday the 24 August, 1655. In the City Hall.

Present the Worshipful Heeren Cornelis van Tienhoven, Allard Anthony, Oloff Stevensen, Johan Nevius, Joh. d'Peyster, Jacob Strycker, Johan Verburgge. . . .

The case deferred yesterday in the matter of the prisoner Jan van Leyden was also postponed until the next sitting, in consequence of the Schout C. van Tienhoven not having instituted or not being prepared with his demand and action . . . .

[*Trial Concluded*] Monday, the 6th Sept. 1655. In the City Hall.

Present the W. Heeren, Cornelis van Tienhoven, Allard Anthony, Oloff Stevensen, Joh. Nevius, Joh. d'Peyster, Joh. Verburgge, Jacob Strycker, and Jan Vingne. . . .

Wolfert Webber and wife being summoned to Court in the complaint against Jan van Leyden, appeared, and persist in their complaint previously entered, but have no further proof. Offer to confirm the same by Oath.

[*Presentment by the Schout*] To the Worship. Burgomasters and Schepens of City Amsterdam in New Netherland:—

Jan van Iselsteyn, alias Jan van Leyden, summoned on complaint of François Fyn and the wife of Wolfert Webber, is detained,

by virtue of your Worships warrant, in the City Hall. The complaint of Fr. Fyn is, that Jan van Iselsteyn struck him in the face, on the highway near Daniel Litschoe's house, laid his hand on the hilt of his sword and threatened the aforesaid Fyn with harsh words, he Jan van Leyden being drunk. Proceeding to and arriving at Wolphert Webber's house and residence, the aforesaid Iselsteyn gave his wife very abusive language, leaped over her fence and struck her on her own ground, as she says, and she shews on her cheek black patches, which the woman states she received from Jan van Iselsteyn in his anger, on her own ground and within her fence. Moreover, the said Jan van Leyden very sorely threatened the above-named woman. The first assault committed on Capt. Fyn on the highway, as appears by the marks on his face, and the threats used toward him cannot be suffered or tolerated in a country, where justice is in vigour, but for the preservation of peace such insolent and disorderly people must be punished; and whereas all, or the major portion of, the good inhabitants know of old that the aforesaid Jan van Iselsteyn is a troublesome and quarrelsome person, whereof abundant proof can be produced, and therefore the complaint of Wolfert Webber's wife is more credible, the Schout requests, that the aforesaid Jan van Iselsteyn, for his public assault, insults, blows, violence and threats committed on the highway on Capt. Fyn and the foregoing, shall be banished out of this jurisdiction of the City of Amsterdam in New Netherland, and shall, moreover, be condemned to pay a fine of one hundred Rix dollars to be applied as may be proper, with the costs and *mises en Justice*. This 6th September 1655. Amsterdam in New Netherland, was signed

Cornelis van Tienhoven.

[*The Court's Deliberation and Judgment.*] Advices and consequent conclusion on the demand of the Schout against Jan van Leyden.

The advice of Allard Anthony is:—That Jan van Leyden shall, for this time, be excused from banishment, on condition that he

shall ask pardon of the Court and promise to behave himself, henceforth, as an honest man, and further pay the costs of this trial.

The advice of Oloff Stevensen:—That for this once Jan van Leyden shall be discharged on payment of all costs, with a warning that on the recurrence of the first offence, he shall be banished and punished as he shall deserve.

The advice of Johan. d'Peyster: That Jan van Leyden shall pay for his confinement and release, and to the Officer, in addition, the sum of fl. 50. and then be immediately released from prison and freed from banishment.

The advice of Johan. Nevius:—Joh. Nevius advises, whereas divers complaints have been entered against Jan van Leyden, and the Fiscal has made his demand, that Jan van Leyden ought to be condemned in a fine of one Hundred Rix dollars, and not banished.

The advice of Joh. Verburgge is:—Whereas what Webber's wife has accused him of cannot be proved, but only his fault, that he be liberated on payment of costs, and not banished.

The advice of Jacob Strycker is:—That Jan van Leyden shall pay his board and the jailor's fee and then be liberated.

The advice of Jan Vigne is:—That Jan van Leyden shall pay one hundred dollars and be exempt from banishment.

Conclusion and Sentence: Whereas Jan Willemsen Iselsteyn van Leyden residing on the island of Manhattans, within the jurisdiction of the city of Amsterdam in N. Netherl. is detained in the City Hall, on the complaint of François Fyn and Wolfert Webber's wife made in Court, at the request of Cornelis van Tienhoven entered in his quality as Schout of this City, because he, Jan van Leyden, struck the said François Fyn, on the face on the Highway, laid his hand on the hilt of his sword and threatened him: also, because he used abusive language towards the wife of Wolfert Webber, jumped over her fence, and struck her on her own ground—

Therefore, the Burgomasters and Schepens of the City of Amsterdam, having heard and examined the complaint and demand of

the officer, the confession and defence of the prisoner with the proofs appertaining to the case, have condemned the said Jan Willemsen Iselsteyn, as their Worships by plurality of votes hereby do, that he, Jan Willemsen Iselsteyn, shall appear in Court and there, with uncovered head, beg of God and Justice pardon for his aforesaid crimes, and promise to henceforth comport himself in peace and quietness without molesting any one touching the aforesaid complaint; or in default hereof, that he, without any mercy, shall, on the first complaint, be punished as it shall behoove, and be moreover banished out the jurisdiction of this City; and that he Jan Willemsen shall acquit and pay the costs of his imprisonment and this trial.

Thus done, sentenced in aforesaid session this 6th September 1655, at Amsterdam in New Netherland.

#### 114. The Witchcraft Court of Massachusetts, A.D. 1692.<sup>1</sup>

*The Judge afterwards prays God to Pardon the Tragic Error.*

I must not omit to notice a special tribunal, created, nominally, under the new charter of 1692, but before the Legislature of the Province had had time to convene.

The Court to which I refer was the special Court of Oyer and Terminer created for the purpose of trying the persons in Essex and other counties charged with witchcraft.

I do not propose to give any account of that melancholy delusion which seized the public mind at the time of which I am speaking. Sir William Phipps, who had been appointed the first Governor under the charter, was a thorough believer in the existence of witches and witchcraft. He, moreover, found the feelings of the people deeply excited against this imaginary exhibition of demoniacal power, and the prisons filled with the victims of this popular delusion. Urged on by the seeming emergency of the case, and sustained by the co-operation of many of the leading men,

1. From *Emory Washburn*, "Sketches of the Judicial History of Massachusetts", Boston, Little, Brown & Co., 1840, p. 141.

especially of the clergy, in the Province, the Governor issued his commission June 2, 1692, constituting the persons named in it a Court to act in and for the counties of Suffolk, Essex and Middlesex. . . . The Court, which became so distinguished for its cruelty and misguided fanaticism, acted without any valid authority, and perpetrated by its punishments, a series of judicial murders without a parallel in American history. . . .

The Court consisted of seven Judges, viz., Stoughton, Chief Justice, Nathaniel Saltonstall (whose place was afterwards supplied by Jonathan Curwin), John Richards, Bartholomew Gedney, Wait Winthrop, Samuel Sewall, and Peter Sergeant. Their first meeting, as I have stated, was at Salem on the 2d of June. They met again on the 28th of the same month, on the 3d of the following August, and the 9th of September. Their last meeting was upon the 17th of that month, after which the Court was dissolved.

. . . During this short period, nineteen persons were tried, condemned and hung for witchcraft, and one was pressed to death. This was Giles Corey, and it is the only instance that I have discovered where the horrible death by the common law judgment of "*peine fort et dure*" has been inflicted in our country. He refused to plead to the indictment against him, knowing that a trial was but the form of convicting him of a felony, by which his estate would be forfeited to the King; and when called upon to answer to the charge against him, stood mute, notwithstanding the importunities and threats of the Court, and entreaties of his friends. He was sentenced on the 9th and suffered on the 19th of September. He was eighty years of age and "as his aged frame yielded to the dreadful pressure, his tongue protruded from his mouth. The demon who presided over the torture, drove it back again with the point of his cane." (Upham's Lec. 88.) Such is the tender mercy of fanaticism.

Before proceeding to give a detailed account of the mode of managing these trials, I will offer the form of one of the indictments under which the unfortunate victims were tried and executed:

"The Jurors &c. present that Mary Osgood, about eleven years ago, in the town of Andover, wickedly, maliciously and feloniously a covenant with the Devil did make and signed the Devil's Book and took the Devil to be her God, and consented to serve and worship him, and was baptized by the Devil and renounced her former Christian baptism, and promised to be the Devil's, both soul and body, forever, and to serve him; by which diabolical covenant by her made with the Devil she is become a detestable witch, against the peace, &c." (1 Hist. Col. 7th, 241.). . . .

The course of proceedings in the trial was as follows: After pleading to the indictment, if the prisoner denied his guilt, the afflicted persons were brought into court, and sworn as to who afflicted them. This testimony having been given in, the "confessors" as they were denominated, that is, those who had voluntarily acknowledged themselves witches, were called upon to tell what they knew of the accused. Proclamation was then made for all who could give any evidence *against* the prisoner, to come into court, and whatever any one volunteered to tell was admitted as evidence, however foreign from the charge for which the prisoner was on trial. The next process was to search the prisoner for "witch marks," which was done by the Jury, who often returned that upon such and such parts of his body, was found a preternatural excrescence. And a wart or a mole became witnesses against the person it deformed.

I have relied for the above account upon a statement made by Mr. Brattle, an eye witness of these trials, which is published in the 5th Hist. Col. 60. At the time he wrote, nine had been condemned besides the nineteen who had been executed and Mr. Corey who had been pressed to death, and there were fifty more in prison who had confessed themselves to be witches. Indeed, escape seems to have been impossible, and a trial was but the form of executing popular vengeance. Juries were intimidated by the frowns and persuasions of the Court, and by the outbreaks of the multitudes that crowded the place of trial, to render verdicts against their own consciences and judgment.

In the case of Rebecca Nurse the Jury brought in a verdict of "Not Guilty", upon which the accusers raised a great outcry. The judges were overcome by the clamor; they expressed their dissatisfaction with the verdict, and one of them in terms of great vehemence. Another of the Judges declared that she should be indicted over again. The Chief Justice told the Jury they had overlooked one important piece of evidence, which was an expression of surprise (as the Court construed it) of the prisoner at the testimony of a witness. They were therefore sent out again, and again returned for an explanation of this expression. The prisoner frankly stated her surprise at seeing a fellow prisoner brought up as a witness against her, and that the expression she had used arose from her inability to hear what was said by the foreman of the Jury on account of her deafness. The Jury however soon returned a verdict of "Guilty" and she was executed accordingly. (Upham's Lec. 84. 2 Hutch. 54.)

I have stated that the last meeting of this Court was upon the 17th Sept. They then adjourned to the first Tuesday in November; but in the mean time the Legislature met, the public mind began to be enlightened, the mania upon the subject of witchcraft began to subside, and before the time to which the Court was adjourned had arrived, the Court was dissolved.

For the credit of New England it would be well if oblivion could settle down over this period of her annals. But the history of that Court furnishes a lesson which ought never to be forgotten. It was a popular tribunal, there was not a lawyer concerned in its proceedings. Every rule of evidence by which the Courts of Common Law are governed was abrogated, and Judges and Jurors were left, untrammelled by the "quibbles of the law," to follow their own feelings and the popular will. . . . Is it to be believed that abuses as monstrous as the whole proceedings of that Court in fact were, could have been tolerated, had there been an enlightened bar in Massachusetts whose services should have been exerted in favor of the accused?

It was not for the want of learning or honesty on the part of those who were engaged in those trials, that injustice was done.

It was that their habits of thought, their entire ignorance of the salutary rules of law, and their want of familiarity with the process of investigating the merits of judicial controversies, unfitted them to hold the scales of justice with impartial hands, and to discriminate between the excited prejudices of the many, and the truth or falsehood of the charges which they were called upon to examine.

I have said the Judges were honest and learned men. . . . If any one could doubt the honesty of this credulity, his doubt would be removed by the public confession offered by Judge Sewall in 1697, on the occasion of a public fast which was appointed by the General Court, "that God would pardon all the errors of his servants and people in a late Tragedy, raised amongst us by Satan and his instruments." (1 Doug. 451.)

#### 115. An Army Military Trial of Indians, A.D. 1832.<sup>1</sup>

##### *The Escape of the Accused leaves the Trial a Fiasco.*

[The Black Hawk War, in which the rebellious tribe of Sacs led by the great chief Black Hawk had been put to rout by the United States Army, ended in 1832. The Winnebago tribe had been implicated,—had indeed themselves given trouble already in 1828 by some murders of white settlers, and one of their young chiefs, Red Bird, who had been arrested and imprisoned to await trial, had died in prison. But now peace was restored, and the plan was to persuade the Winnebagoes by treaty to surrender their lands and remove westward.]

The narrator is the wife of a prominent trader whose parents had been pioneers of the Illinois region since colonial days. The Kinzies afterwards settled permanently in Chicago, and her book, published in 1856, had a popular success and made her name famous in the annals of pioneer Chicago. But at the time of this narrative, 1832, Mr. Kinzie was the Government agent for the Indians at Fort Winnebago, on the Fox-Wisconsin Rivers portage.]

1. From Mrs. John H. Kinzie, "Wau-Bun: the Early Day in the Northwest," ed. Milo Milton Quaife; Chicago, Lakeside Press, R. R. Donnelley & Sons Co., 1932, p. 525.

A very short time had we been quietly at home, when a summons came to my husband to collect the principal chiefs of the Winnebagoes and meet Gen. Scott and Gov. Reynolds at Rock Island, where it was proposed to hold a treaty for the purchase of all the lands east and south of the Wisconsin. . . . The Indians had consented to the sale of their beautiful domain. . . . One of the stipulations of the treaty was, the surrender by the Winnebagoes of certain individuals of their tribe accused of having participated with the Sauks in some of the murders on the frontier, in order that they might be tried by our laws, and acquitted or punished as the case might be.

Wau-kaun-kau (the Little Snake) voluntarily gave himself as a hostage until the delivery of the suspected persons. He was accordingly received by the Agent, and marched over and placed in confinement at the fort, until the other seven accused should appear to redeem him.

It was the work of some little time on the part of the nation to persuade these individuals to place themselves in the hands of the whites, that they might receive justice according to the laws of the latter. The trial of Red Bird, and his languishing death in prison, were still fresh in their memories, and it needed a good deal of resolution, as well as a strong conviction of conscious innocence, to brace them up to such a step. It had to be brought about by arguments and persuasion, for the nation would never have resorted to force to compel the fulfilment of their stipulation.

In the mean time a solemn talk was held with the principal chiefs assembled at the Agency. A great part of the nation were in the immediate neighborhood, in obedience to a notice sent by Governor Porter, who, in virtue of his office of Governor of Michigan Territory, was also Superintendent of the North West Division of the Indians. Instead of calling upon the Agent to take charge of the annuity money, as had heretofore been the custom, he had announced his intention of bringing it himself to Fort Winnebago, and being present at the payment. The time appointed had now arrived, and with it, the main body of the Winnebagoes. . . .

On the morning of a bright autumnal day, notice was given that the Chiefs of the Nation would present themselves at the Agency to deliver the suspected persons as prisoners to the Americans.

At the hour of ten o'clock, as we looked out over the Portage road, we could descry a moving concourse of people, in which brilliant color, glittering arms, and, as they approached still nearer, certain white objects of unusual appearance could be distinguished.

General Dodge, Major Plympton, and one or two other officers took their seats with Mr. Kinzie on the platform in front of the door to receive them, while we stationed ourselves at the window where we could both see and hear.

The procession wound up the hill, and then came marching slowly towards us. It was a grand and solemn sight. First came some of the principal chiefs in their most brilliant array. Next, the prisoners, all habited in white cotton, in token of their innocence, with girdles round their waists. The music of the drum and the Shee-shee-qua accompanied their death-song, which they were chaunting. They wore no paint, no ornaments—their countenances were grave and thoughtful. It might well be a serious moment to them, for they knew but little of the custom of the whites, and that little was not such as to inspire cheerfulness. Only their "Father's" assurance that they should receive "strict justice," would probably have induced them to comply with the engagements of the nation in this manner.

The remainder of the procession was made up of a long train of Winnebagoes, all decked out in their holiday garb.

The chiefs approached and shook hands with the gentlemen who stood ready to receive their greeting. Then the prisoners came forward, and went through the same salutation with the officers. When they offered their hands to their "Father," he declined.

"No," said he, "you have come here accused of a great crime—of having assisted in taking the lives of some of the defenceless settlers. When you have been tried by the laws of the land, and been proved innocent, then, your 'Father' will give you his hand."

They looked still more serious at this address, as if they thought it indicated that their "Father," too, believed them guilty, and stepping back a little, they seated themselves, without speaking, in a row upon the ground facing their "Father" and the officers. The other Indians all took seats in a circle around them, except the one-eyed chief, Kau-ray-kau-say-kah, or the White Crow, who had been deputed to deliver the prisoners to the Agent.

He made a speech in which he set forth that, "although asserting their innocence of the charges preferred against them, his countrymen were quite willing to be tried by the laws of white men. He hoped they would not be detained long, but that the matter would be investigated soon, and that they would come out of it clear and white."

In reply he was assured that all things would be conducted fairly and impartially, the same as if the accused were white men, and the hope was added that they would be found to have been good and true citizens, and peaceful children of their Great Father, the President.

I had watched the countenances of the prisoners as they sat on the ground before me, while all these ceremonies were going forward. With one exception they were open, calm, and expressive of conscious innocence. Of that one I could not but admit there might be reasonable doubts. One was remarkably fine-looking—another was a boy of certainly not more than seventeen, and during the transfer of the medal he looked from one to the other, and listened to what was uttered by the speakers with an air and expression of even child-like interest and satisfaction.

Our hearts felt sad for them as, the ceremonies finished, they were conducted by a file of soldiers and committed to the dungeon of the guard-house, until such time as they should be summoned to attend the Court appointed to try their cause.

The Indians did not disperse after the ceremonies of the surrender had been gone through. They continued still in the vicinity of the Portage, in the constant expectation of the arrival of the annuity money, which they had been summoned there to receive. But the time for setting out on his journey to bring it, was post-

poned by Gov. Porter from week to week. . . . We were, ourselves, about changing our quarters, to our no small satisfaction.

We had been settled but a few weeks, when one morning Lieut. Davies appeared just as we were sitting down to breakfast, with a face full of consternation. "*The Indian prisoners had escaped from the black-hole!*" The Commanding officer, Col. Cutler, had sent for Mr. Kinzie to come over to the fort, and counsel with him what was to be done."

The prisoners had probably commenced their operations in planning escape very soon after being placed in the "black-hole", a dungeon in the basement of the guard-house. They observed that their meals were brought regularly, three times a day, and that in the intervals they were left entirely to themselves. With their knives they commenced excavating an opening, the earth from which, as it was withdrawn, they spread about on the floor of their prison. A blanket was placed over this hole, and one of the company was always seated upon it, before the regular time for the soldier who had charge of them to make his appearance. When the periodical visit was made, the Indians were always observed to be seated, smoking in the most orderly and quiet manner. There was never anything to excite suspicion.

The prisoners had never read the memoirs of Baron Trenck, but they had watched the proceedings of the badgers; so, profiting by their example, they worked on, shaping the opening spirally, until, in about six weeks, they came out to the open air beyond the walls of the fort.

It would be compromising our own reputation as loyal and patriotic citizens, to tell of all the secret rejoicings this news occasioned us.

The question now was, how to get the fugitives back again. The Agent could promise no more than that he would communicate with the chiefs, and represent the wishes of the officers that the prisoners should once more surrender themselves, and thus free

those who had had the charge of them the imputation of carelessness, which the Government would be very likely to throw upon them.

When, according to their custom, many of the chiefs assembled at the Agency, on New Year's day, their "Father" laid the subject before them.

The Indians replied, that *if they saw the young men*, they would tell them what the officers would like to have them do. They could, themselves, do nothing in the matter. They had fulfilled their engagement by bringing them once and putting them in the hands of the officers. The Government had had them in its power once and could not keep them—it must now go and catch them itself.

The Government having had some experience the past summer in "catching Indians," wisely concluded to drop the matter.

#### 116. Colonel Goethals's Sunday Court in the Panama Canal Zone, A.D. 1911.<sup>1</sup>

##### *Prompt Justice and No Appeal.*

Colonel George Washington Goethals, the Chief Engineer and Chairman of the Commission, is now at the head of this great National Job of ours. A visitor to the Isthmus who has not included "the Colonel" among the sights has missed more than half that there is to see down here. . . .

This new Commission, installed April 1, 1907, did not run very smoothly at first. It requires some time for a seven-headed executive to shake down to an equilibrium of power. Several of the Commissioners seemed to think that most, if not all, of the responsibility rested on their own shoulders. They felt much as the other two members of the French First Consulate did before they became entirely acquainted with the character of Napoleon. The struggle was tense while it lasted. But now that the dust has settled, almost every one on the Zone agrees that the best man won. In January, 1908, Colonel Goethals persuaded the Administration

<sup>1</sup> From *Albert Edwards*, "Our Canal", *The Outlook*, vol. XCVIII, p. 391.

at Washington to issue an Executive order which (whatever it may *seem* to say) gave him absolute control. The other six Commissioners are subordinates, most of them cordial, all of them docile.

Certainly modern times have never seen one-man rule pushed to such an extreme. The Colonel, with his immense capacity for work and the restricted area of his domain—about four hundred square miles—succeeds in the role of autocrat, after a fashion which must cause no little envy to Nicholas II. How free-born American citizens accept this condition of things is at first a matter of wonder. One is used to thinking that if we were deprived of jury trials and the right to vote, we would begin to shoot. But down here the only right which has not been alienated is the right to get out. There are two or three steamers home a week. Then of course every one looks on this condition as temporary and necessitated by the unusual circumstances of the Job.

But with all these things which make for submission, such an absolutism would not be endured except for the almost universal feeling that Colonel Goethals is just. He has made enemies, of course, and here and there I have heard men declaiming that they had not been treated fairly, and that they were "going back to the States to live under the Constitution." But the men down here who take an intense interest in the work, whose imaginations have been caught by the immensity of the Job—the real men—would protest in a body at any talk of removing Goethals. . . .

The most remarkable part of Colonel Goethals' routine is his Sunday Court of Low, Middle, and High Justice. Even as the Caliphs of Bagdad sat in the city gate to hear the complaints of their people, so, in his very modern setting—principally maps and blue prints—the Colonel holds session every Sunday morning. . . . I had the good fortune to be admitted one Sunday morning to the audience chamber.

The first callers were a Negro couple from Jamaica. They had a difference of opinion as to the ownership of thirty-five dollars which the wife had earned by washing. Colonel Goethals listened gravely until the fact was established that she had earned it, then ordered the man to return it. He started to protest something



about a husband's property rights under the English law. "All right," the Colonel said decisively. "Say the word, and I'll deport you. You can get all the English law you want in Jamaica." The husband decided to pay and stay. . . .

A man came in who had just been thrown out of service for brutality to the men under him. This action was the result of an investigation before a special committee. The man sought reinstatement. The Colonel read over the papers in the case, and when he spoke his language was vigorous: "If you have any new evidence, I will instruct the committee to reopen your case. But as long as this report stands against you, you will get no mercy from this office. If the men had broken your head with a crowbar, I would have stood for them. We don't need slave-drivers on this job."

Then a committee from the Machinists' Union wanted an interpretation on some new shop rules. A nurse wanted a longer vacation than the regulations allow. A man and his wife were dissatisfied with their quarters. . . . Then a man came in to see if he could get some informal inside information on a contract which is soon to be let; his exit was hurried. An American Negro introduced some humor; he was convinced that his services were of more value than his foreman felt they were. The Colonel preferred to accept the foreman's judgement in the matter. The dissatisfied one pompously announced that he was the best blacksmith's helper on the Isthmus and that he intended to appeal from this decision. The Colonel's eyes twinkled. "To whom are you going to appeal?" he asked.

For the fact is that the verdicts rendered in these summary Sunday sessions will not be revised before the Day of Judgment.

## *Part IV. AMERICA (continued)*

### *b. Latin America*

*Chapter 23*  
**MEXICO**

## MEXICO

## 117. Justice among the Aztecs, A.D. 1500.

*Judicial Records kept by Painted Pictures.*

[Up from the low arid regions of the Northwest onto the high plateau of Central Mexico, at some time in the early centuries of the Christian era, came the Toltec people. Dominating among the surrounding tribes for a few centuries more, they yielded finally, in the 1110s, to a later but kindred people arriving also from the Northwest, the Aztecs.

Of the Toltecs, few traces of their institutions remain. But of the Aztec institutions copious information is available,—partly from their own records, partly from their oral answers to the inquiries of the Spanish missionaries, and partly from the observations of the Spanish rulers and missionaries. The Aztec government was overthrown, A. D. 1519–1521, under the onset of Cortes and his conquistadores. But during and shortly after the process of conquest, there was ample opportunity to study and record the native institutions before they were supplanted by Spanish ones.

The native Mexicans had not developed a systematic script forming an alphabet or a syllabary. But they had made copious records in painted pictures accompanied by a system of signs, or ideographs, for their Nahua language. Of these painted records one of the historians of the 1700s, a devotee of this manuscript material, has told us, "There are innumerable copies of Mexican paintings representing the purport of their laws, and they are not hard to decipher if one is acquainted with the marks and graphs which they used, and knows the language and the meaning of the characters".

There is copious material for reconstructing an outline of the judicial organization and the procedure.<sup>1</sup> But although the Aztec

1. The three modern undertakings to give a complete re-construction of the Aztec legal system are the following:

*Josef Kohler*, "Das Recht der Azteken" (*Zeitschrift für vergleichende Rechtswissenschaft*, 1895, vol. XI, pp. 1–111).

## Chapter 23

- 117. *Justice among the Aztecs A. D. 1500.*  
*Judicial Records kept by Painted Pictures.*
- 118. *Mexican Civil Justice on the Old Santa Fé Trail.*  
*A Yankee Explorer in Trouble.*
- 119. *Mexican Military Justice on Texan Invaders, A. D. 1841.*  
*The Intruders Meet a Harsh Fate.*

judicial proceedings were carefully recorded in the Nahuatl language, the misfortune is that these court records themselves have not survived the destruction of the Conquest. What remains is only half a dozen records of lawsuits in the late 1500s, brought in the Spanish courts after the Conquest, but presented by the natives with the painted pictorial documents of their old custom; and these (with the testimonies and judgments in Nahuatl or Spanish) are accessible only in the untranslated originals, of which a modern scholar has vouchsafed in a rare book very brief abstracts.<sup>2</sup>

It must suffice here, therefore, to present only three passages:<sup>3</sup>

The first gives an outline of the judiciary and the procedure.

The second relates an anecdote illustrating the advanced strictness of the penal law; for it is agreed by all scholars that the stage of primitive clan and family cohesion had long been past; that neither was the blood-feud any longer permitted, nor even a composition-payment in substitute; and that the Aztec central government had developed a rigid State-control of individual violence,—so stern and rigid, indeed, that the husband who killed his wife found in adultery was himself condemnable as a murderer.

The third passage is an abstract of a case presented to the Spanish court in the native picture-documents.]

Herbert M. Wintzer, "Das Recht Altmexikos: I Teil, Privatrecht und Strafrecht" (Zeitschrift above, 1930, vol. XLII, pp. 323-472); unfortunately this author's remaining chapters, including procedure, have not yet been printed.

T. Esquivel Obregon, "Apuntes para la Historia del Derecho in Mexico; Tomo I, Los Origenes, Libro II, El Derecho de los Aztecas", 1937, pp. 275-392; the author is professor of the History of Mexican Law in the Independent School of Law and president of the Mexican Academy of Jurisprudence and Legislation.

2. Eugène Boban, "Documents pour servir à l'histoire de Mexique" (Paris, 1892; two volumes of text, with an atlas of reproductions of the picture-documents explained in the text). Nos. 29, 30, 31, 32, 33, 34, 110, 111, 112, 116, 117, are the "pièces judiciaires". The originals are at Paris, in the collection of Eugène Goupil, bequeathed by him to the Bibliothèque Nationale and the Musée Ethnographique.

3. The first passage is from page 385, and the second one from page 383, of the above work of Professor Esquivel. The third passage is from the note to Plate 111 in the above work of M. Boban (vol. II, page 294).

(1). *Organization of Courts.* At the head of the administration of justice was the King. He was also the head in religion and in war; for the nation recognized no other division of powers than was necessary for distributing the labor under each function.

After the King came the *cihuacoatl*,—a sort of twin, or double, of the monarch. His functions included administration, economics, and justice. His judgments admitted of no appeal, even to the King himself. Precisely what cases fell under his jurisdiction, is not known; but at the capital town of each of the important provinces there was a *cihuacoatl*.

Next was the *tlacatecatl* having cognizance of both civil and criminal causes. In civil causes his decisions were unappealable; in criminal ones there was an appeal to the *cihuacoatl*. The tribunal of the *tlacatecatl* included two assistants, each of whom in his turn had a deputy. The sessions were held in the King's mansion.

In each district (*calpulli*) there was a magistrate (*teuctli*), who gave judgment in petty litigation, and made preliminary investigations in cases of greater consequence and made daily report of them to the tribunal of the *tlacatecatl*.

Finally, in each district was a certain number of *centectlapixques*, whose duties included the supervision and care of a definite number of families and who judicially acted as justices of the peace for the smallest affairs.

Besides these judges of what may be called the regular hierarchy, there was a tribunal of commerce (*tianquiztlatzon tequililtayacpalli*). This was composed of 12 judges (*tianquiztlatzon tequililtayacque*), who held court at the markets and decided summarily and rapidly the disputes arising in commercial transactions. Their judgments could impose a sentence of death, which was executed on the spot. But our information about this tribunal is indeed incomplete.

The Codex Mendocino affords valuable aid for understanding the administration of justice. On Plate LXIV, the painted picture shows four magistrates wearing crowns (*copilli*) as representing the King; they are listening to the utterances of a man and a woman (as told by the ideograph affixed to each); behind the two stand

two men and two women, probably witnesses. Back of each of the judges is a magistrate, who only listens, although he wears a crown,—these being a sort of apprentice-judge.—In Plate LXX is shown the front view of a court-house. It has two stories, with a flight of stairs in front, and three compartments behind it. The center one is occupied by the Emperor, Moctezuma. The one on the right is the quarters reserved for the dignitaries of Tenayucan, Chicunautla, and Culhuacan,—the confederated nations. The one on the right represents the apartments reserved for the dignitaries of Texcuco and Tacuba, also confederates. In front of these compartments are seen the open patios of the royal palace. On the lower story, at the right of the staircase is seen the hall of Moctezuma's Council with four of his ministers, and at the left, the hall of the Council of War. Lower down are seen the litigants,—two men and two women, who are appealing to Moctezuma's Council. Another subject is leaving the tribunal,—victor or vanquished.

. . .

In each court there were scribes who made a record of the proceedings (shown in the drawing), giving permanence to the rights of the parties; thus allowing the inference that the principle of *res judicata* was known. . . .

*Procedure.* A civil proceeding must begin with a sort of petition (*tetlailtlanilitzli*), which was followed by a summons (*tenanatilitzli*) issued by the magistrate (*teuctli*) or other qualified official and served by the bailiff (*tequitlatoqui*); in criminal cases a police officer (*topilli*) had the duty of arresting the accused.

Whether the parties were assisted by a professional legal adviser is not known. Probably no such personage existed, or could exist, with a procedure founded on simple equity wherein they had merely to apply the texts of the laws and where even those rules themselves had no binding force on the judges. There was indeed [in some books] a word signifying "advocate", but this alone is no proof that in the pre-Cortes period such a function was exercised.

The proceedings, it may be inferred, were always oral. But in cases of importance and cases involving realty a record was made

of the litigants' names, the issues, the proofs, and the judgment; and these memoranda were filed and preserved as archives.

The judges kept court from sunrise to sunset. The cases were disposed of with despatch; except that a civil case might last as long as four Mexican months (eighty days), at the end of which time it went to the royal Council, where a report must be made of all undecided cases.

The principal proofs were by witnesses. But if realty was involved, the paintings and the maps, drawn in great detail and carefully preserved, were important parts of the proof. It is said that also proof could be made by the decisory oath; but the effect of this for the various issues is not precisely known. . . .

Upon pronouncement of the judgment (*tlatzolequilitzli*), the parties could appeal to the tribunal of the provincial judge (*tlacatecall*),—if that had not been the trial court. But what were the cases which could go up for decision to the royal Council and the monarch? On this point, and many other aspects of procedure, nothing exact is known, except that there were fixed rules therefor. . . .

After the judgment came its methods of enforcement,—among which figured the prison for debt. The common crier proclaimed the decision. In important cases (other than mercantile) the *cuahnortli*, one of the judges of the provincial court, saw to the enforcement of the judgment.

Such is the picture presented to us of the administration of justice among the Aztecs. The impression which it leaves is one of severity bordering on cruelty. The procedure was swift; technicalities were absent; the defence was restricted; the judge had broad discretion; and the penalties were extremely cruel.

(2) *Stern Justice of a Royal Father.* A young bachelor, son of a gentleman of high rank, scaled the walls of the enclosure wherein were cloistered the daughters of the King of Texcuco, intending to see and to speak with one of the daughters. He was observed to do no more than converse, while standing, with the maiden, also standing. Finding himself detected, the youth promptly sought

safety in flight, for had he not done so he would have paid with his life. But the maiden, though greatly beloved by her father, and though her mother was a lady of high rank, was condemned to be strangled or hanged. And though many besought the father for mercy, it was in vain; for he said that he would be forever dishonored if for such a deed he should not inflict punishment, to set an example to other gentlemen that they should not deem him partial or cowardly; for he was a valiant man, and it seemed to him that if he did not order the death of his daughter he would be classed as a coward.

(3) *An Action between two Towns for Violence done.* Action before the royal Tribunal of Mexico, Feb. 5, 1566, brought by the governor, the mayor, and the principal inhabitants of Temazcaltepec against the mayor, the bailiffs, and the inhabitants of Malacatepec, who with force and arms came and plundered their property, burned down several houses, and imprisoned eight natives. They came by night, armed with axes, clubs, stones, and ropes, forcing the complainants to yield up certain plots of land.

The complaint was presented to the Court in the customary style of native procedure. Four colored drawings set forth what had been carried off in each of the four localities subordinate to Temazcaltepec. In each of the paintings were pictures showing the objects carried off, with the ideographs above them representing the names of their owners. Eight other documents, also containing paintings on the native paper, were offered in corroboration of the other four; these set forth the money values of the objects stolen or burned, presumably as a basis for compensation. These twelve documents were sewed together so that the eight sheets describing the values were annexed to the respective four principal ones.

The voluminous record forming the Spanish part of the proceedings was a full elaboration of the twelve original documents,—making a bundle of nearly one hundred and fifty folios in all. It included the depositions of twenty witnesses, in which at various points were the witnesses' names (given in pictures and ideographs), the pictures of the objects plundered from each one, and sometimes their values. These depositions, together with the

speeches at the trial, furnish a complete explanation of the twelve sheets of pictures. At the end of the record is affixed the royal seal, indicating presumably that the case was one of great public importance.

### 118. Mexican Civil Justice on the Old Santa Fe Trail.<sup>1</sup>

#### *A Yankee Explorer in Trouble.*

[The narrator spent some ten years as a trader on the Old Santa Fé Trail, and afterwards became known as the author of the classic narrative of customs and experiences in that region. In 1839 he had gone across the border to the city of Chihuahua in Northern Mexico, and was now preparing to return to the United States.]

Having closed all my affairs in Chihuahua and completed my preparations for departing, I took my leave of that city for the north on the 31st of October, 1839. I was accompanied by a caravan consisting of twenty-two wagons (all of which save one belonged to me) and forty-odd men armed to the teeth and prepared for any emergency we might be destined to encounter: a precaution altogether necessary in view of the hordes of hostile savages which at all times infested the route before us. . . . To furnish the party with meat, I engaged twenty sheep, to be delivered a few miles on the way, which were to be driven along for our daily consumption. But the contractor having failed, we found ourselves entering the wilderness without a morsel of meat. The second day our men began to murmur—it was surely dry living upon mere bread and coffee: in fact, by the time we entered the territory of the Hacienda de Encinillas, spoken of in another chapter, they were clearly suffering from hunger.

I was therefore under the necessity of sending three Mexican muleteers of our party to *lazo* a beef from a herd which was grazing at some distance from where we had pitched our camp; being one of those buffalo-like droves which run so nearly wild upon

1. From *Josiah Gregg*, "The Commerce of the Prairies", first printed in 1844; reprinted 1926 in the *Lakeside Classics*, edited *Milo Milton Quate*, Chicago, R. R. Donnelley & Sons Co., Lakeside Press, p. 200.

this extensive domain. It had been customary from time immemorial for travelers, when they happened to be distressed for meat, to supply their wants out of the wild cattle which nominally belonged to the hacienda, reserving to themselves the privilege of paying a reasonable price afterwards to the proprietor for the damage committed. . . .

The muleteers had just commenced giving chase to the cattle when we perceived several horsemen emerge from behind a contiguous eminence and pursue them at full speed. Believing the assailants to be Indians, and seeing them shoot at one of the men, chase another, and seize the third, bearing him off prisoner, several of us prepared to hasten to the rescue, when the other two men came running in and informed us that the aggressors were Mexican vaqueros. We followed them, notwithstanding, to the village of Torreon, five or six miles to the westward, where we found a crowd of people already collected around our poor friend, who was trembling from head to foot as though he had really fallen into the hands of savages.

I immediately inquired for the mayordomo, when I was informed that the proprietor himself, Don Angel Trias, was present. Accordingly I addressed myself to *su señoría*, setting forth the innocence of my servant and declaring myself solely responsible for whatever crime had been committed. Trias, however, was immovable in his determination to send the boy back to Chihuahua to be tried for robbery, and all further expostulation only drew down the grossest and coarsest insults upon myself as well as my country, of which he professed no inconsiderable knowledge. . . .

At last, finding there was nothing to be gained by this war of words, I ordered the boy to mount his horse and rejoin the wagons. "Beware of the consequences!" vociferated the enraged Trias. "Well, let them come," I replied; "here we are." But we were suffered to depart in peace with the prisoner. . . .

While at breakfast on the following morning we were greatly surprised by the appearance of two American gentlemen direct from Chihuahua, who had ridden thus far purposely to apprise us of what was brewing in the city to our detriment. It appeared

that Trias had sent an express to the Governor accusing me of rescuing a culprit from the hands of justice by force of arms, and that great preparations were accordingly being made to overtake and carry me back. That the reader may be able to understand the full extent and enormity of my offense, he has only to be informed that the proprietor of an hacienda is at once governor, justice of the peace, and everything besides which he has a mind to fancy himself—a perfect despot within the limits of his little dominion. It was, therefore, through contempt for *His Excellency* that I had insulted the majesty of the laws! . . .

Nothing further occurred till next morning, when just as I had risen from my pallet a soldier approached and inquired if I was up. In a few minutes he returned with a message from *El Señor Capitan* to know if he could see me. Having answered in the affirmative, a very courteous and agreeable personage soon made his appearance, who, after bowing and scraping until I began to be seriously afraid that his body would break in two, finally opened his mission by handing me a packet of letters, one of which contained an order from the Governor for my immediate presence in Chihuahua, together with the three muleteers whom I had sent after the cattle. . . .

Those, however, which most influenced my course, were from Don Jose Artalejo (*Juez de Hacienda*, Judge of the Customs of Chihuahua), who offered to become responsible for a favorable issue if I would peaceably return. . . . I informed the captain that I was willing to return to Chihuahua with the three "criminals", provided we were permitted to go armed and free, as I was not aware of having committed any crime to justify an arrest. He rejoined that this was precisely in accordance with his orders and politely tendered me an escort of five or six soldiers, who should be placed under my command, to strengthen us against the Indians that were known to infest our route. Thanking him for his favor, I at once started for Chihuahua, leaving the wagons to continue slowly on the journey and the amiable captain with his band of *valientes* to retrace their steps, at leisure towards the capital.

Late on the evening of the third day I reached the city and put up at the American Fonda [inn], where I was fortunate enough to meet with my friend Artalejo, who at once proposed that we should proceed forthwith to the Governor's house. When we found ourselves in the presence of His Excellency, my valued friend began by remarking that I had returned according to orders and that he would answer for me with his person and property; and then, without even waiting for a reply, he turned to me and expressed a hope that I would make his house my residence while I remained in the city. I could not, of course, decline so friendly an invitation.

The *Junta Departamental* or State Council, of which Senor Artalejo was an influential member, was convened the following day. Meanwhile every American I met expressed a great deal of surprise to see me at liberty, as from the excitement which had existed in the city they expected I would have been lodged in the safest *calabozo*. I was advised not to venture much into the streets, as the rabble were very much incensed against me; but, although I afterwards wandered about pretty freely, no one offered to molest me; in fact, I must do the sovereigns of the city the justice to say, that I was never more politely treated than during this occasion. Others suggested that as Trias was one of the most wealthy and influential citizens of Chihuahua I had better try to pave my way out of the difficulty with *plata* [silver], as I could stand no chance in law against him. To this, however, I strenuously objected. I felt convinced that I had been ordered back to Chihuahua mainly for purposes of extortion, and I was determined that the *oficiales* should be disappointed.

At first when the subject of my liberation was discussed in the *Junta Departamental* the symptoms were rather squally, as some bigoted and unruly members of the Council seemed determined to have me punished, right or wrong. After a long and tedious debate, however, my friend brought me the draft of a petition which he desired me to copy and sign, and upon the presentation of which to the Governor it had been agreed I should be released. This step, I was informed, had been resolved upon because after mature

deliberation the Council came to the conclusion that the proceedings against me had been extremely arbitrary and illegal, and that if I should hereafter prosecute the Department I might recover heavy damages. The wholesome lesson which had so lately been taught the Mexicans by France was perhaps the cause of the fears of the Chihuahua authorities. A clause was therefore inserted in the petition wherein I was made to renounce all intention on my part of ever troubling the Department on the subject, and became myself a suppliant to have the affair considered as concluded.

This petition I would never have consented to sign had I not been aware of the arbitrary power which was exercised over me. Imprisonment, in itself, was of but little consequence; but the total destruction of my property, which might have been the result of further detention, was an evil which I deemed it necessary to ward off, even at a great sacrifice of feeling.

During the progress of these transactions I strove to ascertain the character of the charges made against me; but in vain. All I knew was that I had offended a *rico* and had been summoned back to Chihuahua at his instance; yet whether for high treason, for an attempt at robbery, or for contempt to his *senoria* I knew not. It is not unusual, however, in that "land of liberty," for a person to be arrested and even confined for weeks without knowing the cause. The writ of *habeas corpus* appears unknown in the judicial tribunals of northern Mexico.

Upon receipt of my petition the Governor immediately issued the following decree, which I translate for the benefit of the reader, as being not a bad specimen of Mexican grand eloquence:

"In consideration of the memorial which you have this day directed to the Superior Government, His Excellency, the Governor, has been pleased to issue the following decree:

"That, as Don Angel Trias has withdrawn his prosecution, so far as relates to his personal interests, the Government, using the equity with which it ought to look upon faults committed without a deliberate intention to infringe the laws, which appears presumable in the present case, owing to the memorialist's ignorance of



them, the grace which he solicits is granted to him; and, in consequence, he is at liberty to retire when he chooses: to which end, and that he may not be interrupted by the authorities, a copy of this decree will be transmitted to him.

"In virtue of the above, I inclose the said decree to you, for the purposes intended.

"God and Liberty. Chihuahua, Nov. 9, 1839.

"Amado de la Vega, Sec.

"To Don Josiah Gregg."

Thus terminated this momentous affair.

# 119. Mexican Military Justice on Texan Invaders, A.D. 1841.<sup>1</sup>

## *The Intruders meet a Harsh Fate.*

[The Texas Government, on winning its independence from Mexico in 1836, claimed as its western boundary a line which would include a large part of the then Mexican Province of New Mexico, including its capital city, Santa Fé. To realize this claim, the inhabitants of New Mexico must coöperate. Accordingly, a small Texas armed delegation set off, in early 1841, across the thousand intervening miles to reach Santa Fé and persuade the New Mexicans to revolt and secede. Ostensibly it was a peaceful mercantile enterprise, but virtually, by international law, it was an act of war upon Mexico. The Mexican authorities would be justified in repelling it by force.

This is what did in fact occur. The ill-fated members of the party were captured and imprisoned, and some of them were executed, as the narrator, one of the party, now sets forth.]

We were suddenly surrounded by more than a hundred roughly-dressed but well-mounted soldiers, armed with lances, swords, bows and arrows, and miserable *escopetas*, or old-fashioned carbines. The leader of this band, whom I will at once introduce as the notorious Dimasio Salezar, instantly rode up, and addressed us as

1. From *George Wilkins Kendall*, "Narrative of the Texan Santa Fé Expedition", first printed in 1844; reprinted, edited by *Milo Milton Quaipe*, in *Lakeside Classics*, Chicago, 1929, R. R. Donnelley & Sons Co., p. 377.

*amigos*, or friends, with the greatest apparent cordiality. . . . There was a frankness, a plausibility about the miscreant that completely concealed his real intentions. . . .

Finding themselves surrounded by a force at least twenty times their number, without the remotest chance to escape by flight even if they felt disposed, and completely imposed upon by the apparent fairness and openness of Salezar's conduct, my companions gave up their arms. . . . Salezar now ordered Don Jesus to march us immediately to San Miguel, where it was thought Armijo had arrived with a large body of troops. . . . The distance from Cuesta to San Miguel was fourteen or fifteen miles. . . .

We were escorted through the principal square or plaza, and taken to a little hole which was dignified with the name of a room. A crowd followed us to our prison doors, and continued to gaze at us until the last minute. . . . We had no sooner risen than Don Jesus told us that the Governor had not yet arrived, and that he should march with us directly towards Santa Fé, distant some sixty miles. . . . Suddenly the sharp and discordant blast of a trumpet announced the approach of General Manuel Armijo, Governor of New Mexico. An abrupt turn in the road had at first concealed his ragged but numerous cavalcade from our sight; but a few steps brought us in full view of all the pomp, circumstance and chivalry, bows and arrows, sycophants and rascals, with which the Governor is usually surrounded. When I say that our guard had been entertaining us during the day with stories of Armijo's cruelty and barbarity, and that they freely gave it as their opinion that we should be ordered to execution on sight, I need not add that the present moment was exciting to a painful degree. . . .

After asking several questions, to which Lewis returned stammering answers, Armijo finally spoke of our main party, and inquired its number and the intentions of the commissioners. He was answered by VanNess and Howard that it was a mercantile expedition from Texas, and that the intentions of the leaders were pacific. . . . Armijo now turned to Don Jesus, and in a pompous and bombastic tone ordered him to guard us safely back to San Miguel

that night, as he wished to hold a conversation with us early on the ensuing morning.

"But they have already walked ten leagues today, your Excellency, and are hardly able to walk all the way back tonight" was the answer of the fellow, who was thinking of his own personal convenience and comfort all the while.

"They are able to walk ten leagues more," retorted Armijo, with a stately wave of his hand. "The Texans are active and untiring people—I know them," he continued; "if one of them *pretends* to be sick or tired on the road, *shoot him down and bring me his ears!* Go!"

"Yes, your Excellency," was the obsequious answer of the cringing Don Jesus. . . .

The road between Santa Fé and San Miguel is rough and uneven, running over hills, and crossing deep gullies. . . . A walk, or rather a hobble of two hours, for we were so stiff and footsore that we could not walk, brought us once more to the plaza or public square of San Miguel. The place was now literally filled with armed men . . . and after bidding adieu to Don Jesus, as we hoped forever, we were marched to a small room adjoining the soldiers' quartel. This room fronted on the plaza, and had a small window looking out in that direction; but the only entrance was from a door on the side. Sentinels were immediately placed at the little window and door, leading us to suppose that this was to be our regular prison-house; but we had scarcely been there ten minutes before a young priest entered at the door, and said that one of our party was to be immediately shot. . . .

The young priest raised himself on tiptoe and looking over our heads, pointed through the windows of our close and narrow prison. We hurriedly turned our eyes in that direction, and were shocked at seeing one of our men, his hands tied behind his back, while a bandage covered his eyes, led across the plaza by a small guard of soldiers. . . . After heartlessly pushing him upon his knees, with his head against the wall, six of the guard stepped back about three paces, and at the order of the corporal shot the poor fellow in the back! . . .

Scarcely was this horrible scene over before we were taken by a strong guard from our prison. Without even being able to divine their intentions, we were marched directly by our late companion, conducted through two or three streets, and finally paraded in front of a small and gloomy hovel having a single window. . . . Immediately in front of the little window, and at a distance of twelve steps, we were next formed in line by our guard, and ordered not to leave our position or move in the least. All was mystery, uncertainty, anxiety. Soon Armijo, dressed in a blue military jacket, with a sword at his side, was seen to approach the window. One by one he pointed us out to some person behind him, of whom we could not obtain even a glimpse, and as he pointed he asked the concealed individual who and what the person was to whom his finger was now directed, his name, business, and the relation in which he stood with the Texan expedition. These questions were asked in a loud tone of voice, and were distinctly heard by all of us, but the answers did not reach our ears, although we listened with an earnestness and intensity that were almost painful. It seemed to us that we were undergoing an arbitrary trial for our lives—a trial in which we could have no friendly counsel, could bring no witnesses, offer no proofs or arguments to the bloodthirsty and lawless wretch who alone constituted the tribunal.

But this torturing suspense was of short duration; for, after having questioned his concealed agent as to each of us separately, Armijo issued from the little house on an opposite side from the window, and with a pompous dignity of manner slowly approached the spot where we were standing, awaiting, with deep anxiety, a sentence from which we knew there was no appeal.

"Gentlemen," commenced the governor, stopping in front of us, "gentlemen, you told me the truth yesterday—Don Samuel has corroborated your statements—I save your lives. I have ordered Don Samuel to be shot—he will be shot in five minutes. He ran away from Santa Fé, and, in attempting to reach Colonel Cooke's party, has been retaken. You now see the penalty of trying to escape. His fate will be yours if you attempt it. Sergeant of the

guard, conduct these gentlemen back to prison." This was delivered in a loud, military voice.

While congratulating ourselves upon this most unexpected termination of a trial of such harrowing interest, and wondering who the Don Samuel was whose testimony had thus evidently saved our lives, our old friend and guide, Howland, was led forth from the little room. The truth now flashed upon us—we knew that his name was Samuel, that he had been acquainted in former years with Armijo, and that the Mexicans seldom use other than the Christian appellation when addressing or speaking of a man. Howland's hands were tied closely behind him, and as he approached us we could plainly see that his left ear and cheek had been cut entirely off, and that his left arm was also much hacked, apparently by a sword. The guard conducted their doomed prisoner directly by us on the left, and when within three yards of us the appearance of his scarred cheek was ghastly; but as he turned his head to speak, a placid smile, as of heroic resignation to his fate, lit up the other side of his face, forming a contrast almost unearthly. We eagerly stepped forward to address him, but the miscreants who had charge of us pushed us back with their muskets, refusing even the small boon of exchanging a few words with an old companion now about to suffer an ignominious death. Howland saw and felt the movement on our part. He turned upon us another look, a look full of brave resolution as well as resignation, and, in a low but distinct tone, muttered, "Good-by, boys; I've got to suffer. You must—" But the rest of the sentence died on his lips, for he was now some yards in the rear of us, and out of hearing.

The guard who had charge of us now wheeled us round, and marched us in the same route taken by our unfortunate guide, and within ten yards of him. A more gloomy procession cannot be imagined. . . . Howland was again ordered to march. With a firm, undaunted step he walked up to the place of execution, and there, by the side of his companion, was compelled to fall upon his knees with his face towards the wall. Six of the guard then stepped back a yard or two, took deliberate aim at his back, and before the report of their muskets died away poor Howland was

in eternity! Thus fell as noble, as generous, and as brave a man as ever walked the earth. . . .

On the morning which followed the night described in the last chapter, we were taken to new quarters in another part of the town, where a small room was provided for our prison. We had barely time to examine our new quarters before the Governor sent a guard to escort us to his lodgings at the priest's house. On being brought before him we found the great man surrounded by his principal officers, both military and civil, and from their obsequious manner it was evident enough that Armijo's power was supreme. . . . After a little commonplace conversation, Armijo next gave special directions to the old alcalde of San Miguel that we should be well treated, that all our wants should be provided for, and that no one could insult or impose upon us without incurring his most fierce and vindictive wrath. He then dismissed us, remarking, as we were leaving the room, that if one of us attempted to escape during his absence life should be the forfeit.

[After a long imprisonment they were finally freed.]

*Chapter 24*  
***SOUTH AMERICA***

## SOUTH AMERICA

120. The Courts of Justice of the Incas of Peru.<sup>1</sup>*Records kept by Knotted Cords.*

[The Inca race of Peru, developing between A. D. 100 and A. D. 1522, when it was overthrown and conquered by the Spanish invaders under Pizarro; had reached a notable degree of governmental organization. No record of a judicial trial is extant; but their system of courts is well known. The remarkable record here quoted is from a chronicler who was the son of a Spanish official by an Inca mother of high rank, and he had taken the greatest pains to secure accuracy:]

The Yncas ordained a law by which it seemed to them that they would prevent all the evils that might have a tendency to arise in their empire. They ordered that, in all the towns of their dominions, both large and small, the inhabitants should be registered by decades of ten, and that one of these should be selected as a decurion, to have charge over the other nine. . . . Thus there were chiefs over ten, fifty, a hundred, five hundred, and a thousand, subordinate one to the other, from the decurion to the chief over a thousand, whom we should call a general. . . .

The decurion was obliged to perform two duties in relation to the men composing his division. . . .

The other duty was to act as a crown officer, reporting every offence, how slight soever it might be, committed by his people, to his superior, who either pronounced the punishment, or referred it to another officer of still higher rank. For the judges were appointed to hear cases, according to their importance, one being superior to another. The object of this was that there might be officers who could treat some cases summarily, in order that it might not be necessary to go before superior judges with appeals.

1. From *Inca Garcilasso de la Vega*, "The Royal Commentaries of the Incas" transl. *Clements R. Markham*, 2 vols. Hakluyt Society Publications, 1st ser. Vols. XLI & XLV, 1867, 1871, vol. 1, p. 143.

## Chapter 24

120. *The Courts of Justice of the Incas of Peru.*  
*Records kept by Knotted Cords.*
121. *Justice in a Cannibal Tribe of the Amazon Jungle.*  
*The Chief confiscates the Booty of the Disputants.*
122. *Summary Justice at a Rubber Camp in the Amazon Jungle, A.*  
*D. 1900.*  
*Rubber is Ruthless.*

It was considered that light punishments gave confidence to evil doers; and that, owing to numerous appeals, civil suits might be endless, causing the poor to despair of getting justice and to give up their goods rather than endure so much annoyance, for to recover ten it might be necessary to spend thirty. It was therefore provided that in each village there should be a judge, who should finally settle the disputes that might arise amongst the inhabitants; but when the dispute was between two provinces respecting boundaries, or rights of pasturage, the Ynca sent a special judge, as we shall relate further on. . . .

The judge had no power to mitigate a penalty ordained by the law, but he was obliged to execute it in its integrity, on pain of death, as a breaker of the royal commandment. They said that to give the judge any discretion in the infliction of punishments was to diminish the majesty of the law ordained by the King, with the advice of men of such experience and wisdom as he had in his council, which experience and wisdom were wanting to the inferior judges. It was also considered that such discretion would make the judges venal, and open the door to petitions and bribes, whence would arise very great confusion in the commonwealth, each judge acting according to his caprice. A judge, therefore, should not assume the position of a lawyer, but should put in force that which the law commanded, how severe soever it might be. Assuredly, if we consider the severity of those laws, which generally (however slight the offence might be, as we have already said) imposed the punishment of death, they may be said to have been the laws of barbarians. But looking to the benefit which accrued to the commonwealth from this very rigour, it may, on the other hand, be affirmed that they were the laws of a wise people who desired to extirpate crime; for the infliction of the penalties of the law with so much severity, and the natural love of life and hatred of death in men, led to a detestation of those crimes which led to it. Thus it was that, in the whole empire of the Yncas, there was scarcely a crime to be punished in the year. For the whole empire, being 1,300 leagues long and containing so many nations and languages, was governed by the same laws and ordinances, as if it had been no more than one house.

They did not have appeals from one tribunal to another, in any suit, either civil or criminal; for, as the judge had no discretion, he enforced the law bearing on the case at once, and thus concluded the suit; although under the government of those kings, and from the mode of life of their vassals, few civil suits arose. In each village there was a judge to hear the cases which arose in it, who was obliged to enforce the law within five days of having heard the suit. If a case came before him of more than usual atrocity or importance, requiring a superior judge, it went before the judge of the chief town of the province. For in each province there was a superior governor, but no litigant could go beyond his own village or province to seek for justice. The King's Yncas knew well that for a poor man, on account of his poverty, it was not well to seek justice out of his own country, nor in many tribunals, owing to the expenses he would incur, and the inconvenience he would suffer, which often exceed in value what he goes in search of, and thus justice disappears, especially if the lawsuit is against the rich and powerful, who, with their might, stifle the rights of the poor. Desiring to avoid such inconveniences, these princes gave no discretion to the judges, nor did they allow many tribunals, nor the practice of litigants leaving their own provinces.

The ordinary judges gave a monthly account of the sentences they had pronounced to their superiors, and these to others, there being several grades of judges, according to the importance of the cases. For in all the offices of the state there were higher and lower grades, up to highest, who were the presidents or viceroys of the four divisions of the empire. These reports were to show that justice had been rightly administered, and to prevent the inferior judges from becoming careless; and if they were so, they were punished severely. This was a sort of secret inspection, which took place every month.

The way of making these reports to the Ynca, or to those of his Supreme Council, was by means of knots, made on cords of various colours, by which means the signification was made out, as by letters. The knots of such and such colours denoted that such and

such crimes had been punished, and small threads of various colours attached to the thicker cords signified the punishment that had been inflicted, and in this way they supplied the want of letters.

#### 121. Justice in a Cannibal Tribe of the Amazon Jungle.<sup>1</sup>

##### *The Chief confiscates the Booty of the Disputants.*

[The narrator, a well-known South American explorer, while on an expedition in the forest, in 1910, was rescued from a starvation-death by this cannibal tribe, the Mangeromas, on the upper Amazon, and lived among them as a friend for several months.]

The word of the Chief was law, and no one dared appeal from the decisions of this man. In fact, there would have been nobody to appeal to, for the natives believed him vested with mysterious power which made him the ruler of men. I once had occasion to see him use the power which had been given him.

I had accompanied two young Indians, one of whom was the man we had met in the forest on our return trip not far from that fatal *tambo* No. 3. His name, at least as it sounded to me, was Reré. They carried bows and arrows and I my automatic pistol, although I had no great intention of using it. What little ammunition I had left I desired to keep for an emergency, and, besides, I reasoned that I might, at some future time, be able to use the power and noise of the weapon to good advantage if I kept the Indians ignorant of them for the present.

We had scarcely gone a mile, when we discovered on the opposite side of a creek, about one hundred and fifty yards away, a wild hog rooting for food. We were on a slight elevation ourselves and under cover of the brush, while the hog was exposed to view on the next knoll. Almost simultaneously my companions

1. From *Algot Lange*, "In the Amazon Jungle: Adventures in Remote Parts of the Upper Amazon River, including a Sojourn among Cannibal Indians"; edited by *J. Odell Harrison*, introduction by *Frederick S. Dellenbaugh*; New York, G. P. Putnam's Sons, 1912, p. 331.

After a search of a hundred or more books of South American travel and adventure, the narrative herewith is the only one found that deals with the trial methods of any of the scores of native primitive tribes.

fitted arrows to their bow-strings. Instead of shooting point blank, manipulating the bows with their hands and arms, they placed their great and second toes on the cords on the ground, and with their left arms gave the proper tension and inclination to the bows, which were at least eight feet long. With a whirr the poisoned arrows shot forth, and, while the cords still twanged, sailed gracefully through the air, describing a hyperbola, fell with a speed that made them almost invisible, and plunged into the animal on each side of his neck a little back from the base of the brain.

The hog dropped in his tracks, and I doubt if he could have lived even though the arrows had not been poisoned. Tying his feet together with plant-fibres we slung the body over a heavy pole and carried it to the *maloca* [hut]. All the way the two fellows disputed as to who was the owner of the hog, and from time to time they put the carcass on the ground to gesticulate and argue. I thought they would come to blows. When they appealed to me, I declared that the arrows had sped so rapidly that my eyes could not follow them and therefore could not tell which arrow had found its mark first.

A few yards from the house my friends fell to arguing again, and a crowd collected about them, cheering first the one then the other. My suggestion that the game be divided was rejected as showing very poor judgment. Finally, the dispute grew to such proportions that the Chief sent a messenger to learn the cause of the trouble and report it to him.

The emissary retired, and the crowd immediately began to disperse and the combatants quieted. The messenger soon returned saying that the Great Chief would judge the case and ordered the men to enter the *maloca* [community-hut]. With some difficulty the hog was dragged through the door opening, and all the inhabitants crawled in after. The Chief was decked out in a new and splendid feather dress, his face had received a fresh coat of paint (in fact, the shells of the *urucu* plant with which he coloured his face and body scarlet were still lying under his hammock), and his nose was supplied with a new set of *mutum* feathers. He was sitting in his hammock, which was made of fine, braided, multi-

coloured grass-fibres and was fringed with numerous squirrel tails. The whole picture was one which impressed me as being weirdly fantastic and extremely picturesque; the reddish, flickering light from the fires adding a mystic colour to the scene. On the opposite side of the fire from where the Chief was sitting lay the body of the hog, and at each end of the carcass stood the two hunters, straight as saplings, gazing stolidly ahead. In a semi-circle, facing the Chief and surrounding the disputants, was the tribe, squatting on the ground. The Chief motioned to me to seat myself on the ground alongside of the hammock where he was sitting.

The men told their story, now and then looking to me for an affirmative nod of the head. After having listened to the argument of the hunters for a considerable time without uttering a syllable, and regarding the crowd with a steady, unblinking expression, with a trace of a satirical smile around the corner of his mouth, which suited him admirably, the Chief finally spoke. He said: "The hog is mine.—Go!"

The matter was ended with this wise judgment, and there seemed to be no disposition to grumble or re-appeal to the great authority.

## 122. Summary Justice at a Rubber Camp in the Amazon Jungle, A.D. 1900.<sup>1</sup>

### *Rubber is Ruthless.*

[In the earlier days of the rubber trade, the native inhabitants, both in Brazil and in the Congo, were harshly oppressed by the exploiting companies. The cruelest penalties were imposed in compelling the natives to labor in the rubber forests. So notorious internationally became this oppression at last that the respective Governments interfered to end the abuse.

The narrator, during this period, acted as medical officer for rubber companies in various parts of South America, and was a

1. From *Herbert Spencer Dickey*, "The Misadventures of a Tropical Medic", New York, Dodd, Mead & Co., 1929, p. 115, by permission of the publishers.

Copious similar tales of highhanded oppression of the natives in the rubber region are found in the following: *G. Sidney Paternoster*, "The Lords of the Devils' Paradise," London, L. Stanley Paul & Co., 1913.

first-hand observer of the methods. At the time of the incident narrated, he was in the employ of the Peruvian Amazon Rubber Company.]

I was delighted with my new job, and with all the enthusiasm of youth I looked over the jungle station at which I had so providentially arrived. The main structure was an excellent two story building, roofed, it is true, with corrugated iron, but otherwise beyond criticism. . . . There were only five white men at the post—including myself—and we all lived in this major structure.

The cook house was at some little distance from the main structure, and contained a room occupied by Armando King, a Barbados Negro cook, who, the very first time I saw him, impressed me as being an untrustworthy—a decidedly *bad* hombre. He was far too subservient to his superiors, and I later learned that to those whom he did not fear he was a veritable devil. . . . All the buildings in this little group stood well up on the high, shelving river bank in a clearing that was of some considerable extent—a clearing given over largely to manioc patches, and to other agricultural uses.

But long before I had explored the limited domain even of this clearing, an incident took place that served well enough to bear out my first impression of the Negro cook, Armando King, and might, had I been wiser, have shown me what was, in reality, going on constantly behind the scenes in that ghastly region of the Putumayo.

A cow, belonging to the station, I was told, had been found hamstrung. I remember the feeling of disgust that swept over me at such wanton cruelty. The creature had to be killed, of course; but already she had been lying wounded for hours—perhaps for a day or so—when she had been found, and it was obvious that some savage had been guilty of the offense. Earlier, it seemed, a cow had utterly and completely disappeared under rather questionable circumstances, and no one had ever been punished. But now several bits of evidence pointed to a group of Indians who lived a



few miles out in the jungle, and they were brought in and questioned.

There were seven of them, under the leadership of one Quicha, and having overheard the questioning I had to admit that they were given plenty of opportunity to tell on the man who was guilty. But every one of them, Quicha included, refused to say a word. Just what the evidence was that pointed to this group I do not know, but it was fairly strong, and after the questioning had produced no results, these seven men were taken to the main house, across the front of which, at the level of the second story, ran a wide porch, and there, beneath that porch, they were all staked out face down on the ground, each hand and foot tied to a stake driven into the earth.

Such treatment struck me at once as being rather strenuous, but the offense had been serious, and I did not feel that in my inexperience with these particular natives I could say anything. But when Armando King, the cook, was called, and when I saw him appear with a terrible tapir hide whip called a "ronzal," the lash of which was five feet long, three inches wide, and an inch thick, I could not help but shudder. Apparently with some reluctance, the manager, Miguel Loayza, gave the order for King to lash these tied natives, and King, with a smile of horrible pleasure on his untrustworthy face, whirled that terrible whip about his head and brought it down across the back of the first man.

The first blow brought blood, and the Indian's body sprang from the ground as high as his tied hands and feet would permit. I was horrified, and when blow after blow fell upon the tortured creature I left the place, for I could bear no more.

I went down beside the river to think things over. That these Indians had been guilty of a serious offense was true enough, but their punishment was terribly brutal. Furthermore, they had not admitted their guilt, and no court of law had passed a verdict on them.

However, there was no law in that distant jungle station, save such law as the handful of white men could enforce. It was a very difficult question to answer, and I could not make head or

tail of it. I had seen the cow, and certainly anyone who was guilty of such an offense was not being unduly punished by a few lashes even from such a frightful whip as the one being wielded by Armando King. Still, though the offense was grave, the punishment was not such as I might have shown. But when I came to wonder what I would have done had I been the one to mete out justice in that wild land, I had to admit that I did not know what would be the most effective. The men of this rubber company knew best how to handle the natives. All I could do was shake my head and wonder. . . .

So I got to my feet and climbed the bank once more. There were the seven Indians, their backs bleeding and pulpy masses. They were glumly squatting in the shade. One look was enough, and I went up the stairs to my room and brought forth some antiseptic solution that I spread on their wounds. Later I spoke to Loayza about them.

"We knew they were guilty," he told me, "and one of them admitted it, finally."

That was true enough. One did admit it, and it is highly probable—I speak after having had long experience with South American Indians—that all of them had been mixed up with it. However, that terrible punishment bothered me, though I still did not know what I would have done instead.

However, even such horrors as that are forgotten, and I forgot it more or less. . . . I was beginning to wonder about these men with whom I was associated. I had seen many things. Since that first beating of the seven Indians I had seen nothing more of that kind, it is true. . . . Still, from time to time men about the place drank too much and talked too much while they were in their cups. At first I took these mutterings to mean little, thinking that the terrible things they talked about were the figments of their imaginations. But when I began to put all these points together I grew more and more certain that the Putumayo District was one vast torture chamber, where the handful of rubber officials, whose word was law, tortured and killed and maimed as they, in their degeneracy, saw fit.

*Part V. OCEANIA*

*Chapter 25*  
*PRIMITIVE NATIVE TRIBES*

## PRIMITIVE NATIVE TRIBES

[Introductory. Looking at the map of the Pacific Ocean, and at the maze of islands large and small which fill that ocean from 20° North down to 40° South latitude, this insular maze may readily be classified into six groups, as follows:

At the south end, *New Zealand*; then northwesterly, to *Australia*; then still northwesterly, to *Indonesia* (Borneo, Sumatra, Java, etc.); then turning directly eastward, to *Melanesia* (New Guinea and the adjacent smaller groups); then eastward but also in fan-shape northeast and southeastward, to *Polynesia* (Hawaii and Samoa are the largest of this large group); and finally, left behind us, but just north of Melanesia, remains *Micronesia* (Caroline and Marshall groups; several nests of "littlest islands").

The peoples of these six groups, though having a more or less common origin, varied widely in their stages of development attained when Occidental observers (travelers, missionaries, merchants, scentists) first studied them. At the forefront, in intellectual traits and political organization, were the Maoris of New Zealand and the Malays of Indonesia. Next, but at some distance, came the Hawaiians and the Samoans. The others almost all had remained at an early ethnic stage. None of them had invented a writing; but the Malays had received the Islamic religion and Arabic writing, and also (in some islands) Buddhism, before A. D. 1000, and some of this educative material had later travelled up into the Philippines.

The geographical origin of these populations has been the subject of much learned speculation. Suffice it here to say that (by general agreement, but with disagreement on details) they stemmed at some period B. C. back to Indonesia, which itself had earlier received various immigrations from eastern India and from southeastern Asia. Their expansion eastward into the islands of Melanesia and Polynesia took place in migratory waves, perhaps between B. C. 200 and A. D. 400 or later.

## Chapter 25

123. *Community Justice Among the old New Zealand Maoris.*  
*Expiation by Formal Plunder.*
124. *Settlement of a Feud among the Head-Hunters of Papua.*  
*Reconciliation by Ceremonial Feasting.*
125. *Trials among the Nabaloi Tribe of the Philippines.*  
*A Wide Range of Choice among Ordeals.*
126. *A Day in Court at Fiji.*  
*The Presiding Judge Plays the Jewsharp.*
127. *Litigation among the Ifugao in the Philippines.*  
*The Professional Go-Between as Indispensable; and a Wrestling Match as an Ordeal.*
128. *Village Justice in Samoa.*  
*The Village Assembly Feasts upon the Culprit Family's Property.*
129. *The Samoans under Reformed Occidental Procedure.*  
*Simplicity vs. Complexity.*

Most of their languages have a common agglutinative structure of the Turanian type, as distinguished from the inflectional or Indo-European type. Most of them also have common features of social structure; for they measure family relationships, not by parental genealogies, but by collateral classifications which make nearly every one in a village to be related in some degree to every one else.

But, in spite of these common features, the isolated life of these hundreds of groups in thousands of islands, using different dialects and vocabularies, has led to an extraordinary variety of social institutions. In many instances (one observer reports) people living in different districts of small islands cannot understand each other's speech. Thus can be found all varieties of political control,—virtual anarchy, communism, chieftainship, elders' council, oligarchy. Collective tribal or family responsibility was found, as well as individual responsibility. Unrestricted blood-revenge obtained in one place, well-organized justice in another. Tabu in one form or another was universal, and a variety of ordeals were in use. The modes of procedure for negotiating to settle a dispute were perhaps more varied than even among the North American Indians and the African tribes.

Out of a wealth of records by Occidental observers, the following few selections will serve to illustrate the variety of trial-methods.]

### 123. Community Justice among the old New Zealand Maoris.<sup>1</sup>

#### *Expiation by Formal Plunder.*

An institution which succumbed to civilizing influences only very recently, was the New Zealand law of *murū*.

In speaking of *murū* as a law, one uses the latter term in a broad sense, in the sense of a rule of action established by long usage. In a stricter sense and from our point of view, *murū* would seem to have been essentially lawless. . . . However, to avoid

1. From George H. Westley, "The Law of Muru", The Green Bag, 1898, vol. X, p. 73.

getting further entangled in paradox, we will look at once into the practical working of the thing.

A little Maori boy, while playing around the open fire, tumbled into it and was very severely burned. With us the parents would be consoled with for the sad accident. Not so with the Maoris. The father was immediately and lawfully visited by a *muruing* party, and cleaned out of provisions, furniture, canoes, fishing nets, in fact pretty nearly everything he possessed. . . .

Now all this seems curious enough from our point of view, but more curious still is the fact that the victim of these persecutions, instead of feeling angry and resentful, sat down in his nudity and thanked his blessed stars for his good fortune. The greater his punishment, the greater was his gratification; for the fact that his neighbors had taken so much trouble over his case, showed him to be a person of no small consequence amongst his people. To be allowed to go scot free would indicate that he was a nobody, so meanly held by those around him that they did not think him worth *muruing*. And there was another consideration. The man who was himself *murued*, was privileged to take part in the *murū* of another; so that if he had an envious eye on any particular piece of property held by his neighbor, that article was now brought more within the probability of his possession. In the eyes of the law of *murū*, so to speak, a blunder was more important than a crime. Indeed, the punishment of a crime did not seem to come within its province, as we shall see later on. It was rather a penal law for carelessness and folly, or, as one writer expresses it, "a process of atonement, which the disgraced individual goes through in order to be restored to good and regular standing." . . .

In a genuine case of *murū*, there were certain well-defined rules to be followed. Take, for example, the case of the burnt child. The first to take action in the matter was the family of the mother—the child being held to belong to the family of the mother more than of the father. Their resentment against the unfortunate parent would seem to have been for his allowing an incipient warrior, of whom he had the rearing, to be so injured. To permit such a matter to pass unnoticed would be an insult to all concerned, for

it would mark them among their tribe as persons of no importance. Clearly, to maintain the standing of both families, the father must be murued. His brother-in-law took the matter in hand and mustered a strong party. A messenger was dispatched to the offender to announce their coming. "Is it to be a great muru?" inquired the victim. "Yes," said the messenger, "it is to be a very great muru indeed." With heart bounding with delight, the man got ready to be "licked." So pleased was he at the prospect that he took the trouble to prepare a feast of his best things for those who were coming to punish him.

When the muruing party arrived he seized his finest spear and went out to meet it. Every man was armed. His brother-in-law advanced threateningly and gave the cry, "Stand up!—stand up! I will kill you this day!" He and the defendant then engaged in what appeared to be a combat to the very death. But there must be no killing, for that was against the law of muru. Neither was it proper for the defendant to worst his assailant, though it was quite correct for him to make a good show of defense. At the first sign of blood the duel was over. Then the brother-in-law roared, "Murua! murua! murua!" and the sacking of the house was begun. The raiders appropriated pretty nearly everything that was movable and divided the loot among themselves. . . .

I conclude this brief and imperfect sketch of the Maori law with a story of two which will further illustrate its workings. A young Maori chief named Mawea lived with his handsome wife on the outskirts of a village. One day while Mawea was absent from home attending an assembly of his people, his wife eloped with a young chief from a neighboring tribe. The injured husband had two courses open to him; he could go to his people and with fiery eloquence demand that they fight the robber's tribe to regain possession of his bride; or else he could approach them mournfully and quietly relate his trouble, in which case he well knew what would happen. He chose the latter course. His case was discussed for an hour or so by the leading men of the village, and he was told to return to his home, with the assurance that the matter would be attended to on the following day. The next morning

a muru party arrived and he was gratified to see that it numbered fully fifty men. He went out and paraded with seeming defiance up and down in front of his dwelling, holding in his hand a formidable looking bludgeon, which, however, was really very harmless, being made of a flax stalk, and as light as cork. The preliminaries, part of which was a long address, being over, the leader gave the signal and three stalwart fellows of the muru party moved to the attack. Mawea met them with several vigorous blows, and they drew back, pretending to be very much hurt. Then a dozen others rushed forward with solid clubs and felled the young chief to the ground. When they had finished with him, he lay bathed in blood and almost insensible. Stripping off his clothes as part of their plunder, they ran into the house and sacked it from top to bottom, after which they set it on fire and stood by until it was totally consumed. Then breaking down the fences and smashing gates, to complete their work of destruction, they shouldered their newly acquired property and marched away, leaving their victim naked and bleeding where he had fallen. An hour or so later, when Mawea had revived sufficiently to realize how greatly he had been honored, a neighbor who had come up remarked, "This is a very bad work indeed." "Bad," said he, "no, no! very, very good work. You must remember I had a very bad wife."

Concerning the passing of this singular Maori law, Judge Manning, who spent many years in New Zealand, wrote in the early sixties as follows: "I think the reason that the muru is so much less practiced than formerly, is the fact that the natives are now better supplied with the necessaries and comforts of life than they were many years ago, especially iron tools and utensils; and in consequence the temptation to plunder is proportionately decreased. When I first saw the natives, the chance of getting an axe or a spade by the summary process of muru, or—at a still more remote period—a few wooden implements or a canoe, was so great a temptation, that the lucky possessor was continually watched by many eager and observant eyes, in hopes to pick a hole in his coat, by which the muru might be legally brought to bear upon him. I

say legally, for the natives always tried to have a sufficient excuse; and I absolutely declare, odd as it may seem, that actual, unauthorized, and inexcusable robbery or theft was less frequent than in any country I have ever been in, though the temptation to steal was a thousandfold greater."

#### 124. Settlement of a Feud Among the Head-Hunters of Papua:<sup>1</sup>

##### *Reconciliation by Ceremonial Feasting.*

[The island of New Guinea (the largest in the world) lies north of Australia, just across the Torres Straits. Papua was its native name, and many of its native tribes were head-hunters. The narrator spent many years among the headhunters. The *gaera*, herein referred to by him, is a wooden framework, some 20 feet high, with several tiers, on which food is stacked.]

The *gaera*, which is made in the interest of peace, is a very interesting ceremony, which may be called one of reconciliation. It is held under some such circumstances as the following:

One man has done an injury to another and a violent quarrel ensues. In such a case the men-folk would naturally take the side of the member of their own clan, and the trouble would spread; then the women-folk would begin to take up cudgels on behalf of their own clan, and soon there is a feud between two different clans. Trouble of this kind has been known to last for months and even years in the native community, just as such things have done even in civilized, or supposedly civilized, countries. After one such quarrel, which may have severed lifelong friendships, has been carried on for some time, the father or elder brother of the injured party may intervene, and suggest that the son or brother make a garden for a *gaera*. This would be made at the very first opportunity, and when the food is ready for being taken out of the ground arrangements for holding a *gaera* would be made without delay.

1. From B. Baxter Riley, "Among Papuan Headhunters", London, Seeley, Service & Co., 1925, p. 255.

Every person in the village knows what is on foot. When the inspection of the gardens (*giradaro*) is made, the owner of each garden must reveal the secret to the men of the village. When the elders go past a plot planted for the *gaera*, the maker of that particular garden would call out: "Gaera!" The person for whom it is being made [i. e. the wrongdoer] is then filled with shame.

The ceremony lasts about eighteen days or more. . . . The next three days are devoted to a dance called *misamisa*. The men dress in the sacred ground at three P. M., proceed to the village and dance till six P. M.

The *gaera* framework or stall is now stacked with food. The person making the *gaera* places a part of his contribution on the top of the framework and part on the ground, the intervening spaces being filled with food supplied by members of the various clans. Then follows the *gaera* dance, which is continued all night. At daylight all the dancers disrobe and sit on the ground in anticipation of the coming scene. When all is quiet, the person who has been wronged slowly mounts the wooden framework and stands upon the top tier or platform, called *todo*, and with bow and arrow in hand begins to address the assembly in a loud voice, and says: "Friends, I have been wronged by a man [here the name is spoken]. I want to make an end of this trouble to-day. I have made this feast for you." He then raises his bow, places the arrow on the bow-string, fires the arrow into the sea, and says: "I shall no more think about this quarrel. It is now finished." He then descends to the ground. The food is distributed. The portion which was put on the ground is given by the man to his former enemy, the rest is divided amongst the other members of the community. A large earthen oven is then made, about fifteen feet long, two feet broad and eighteen inches deep, named *kurikuri*; this is filled with food, which when cooked is shared by all the inhabitants of the settlement.

The man who has done the wrong will make a garden ready for the following south-east season, when he will make another *gaera* and return the present food which he has received, after which the

feud is considered at an end. Only one *gaera* can be made during the year. Along the coast the *gaera* was only made for the purpose of settling a quarrel. It is now a thing of the past.

### 125. Trials among the Nabaloi Tribe of the Philippines.<sup>1</sup>

#### *A Wide Choice among Ordeals.*

[The Nabaloi tribe of the Igorot race inhabit the mountain region of northern Luzon. The narrator spent some twelve years in that region as an administrative official:]

In the Nabaloi tribe of the Igorot race in Luzon, from time to time the *impanama* or wise men are convened to form the *Tongtong* and to administer justice. This judicial body enjoys the support of public opinion and hence can enforce its decrees. The *impanama* are not paid, and are convened at least once a year whether there is litigation or no. There is one *Tongtong* in Kabayan, one in Gusaran, one in Lutab, one in Pakso, etc. If the litigants belong to different settlements, a joint meeting of the *Tongtongs* pronounces judgment. If they disagree, the grievance is redressed by the feud.

When the *Tongtong* assumes jurisdiction, the litigants present their cases. Witnesses swear by the following oath, "Although I may die, what I shall say is true", and then testify. Judgment is given to the litigant who has more witnesses, irrespective of the quality of the testimony. If the plaintiff has as many witnesses as the defendant, the property is divided equally between them.

If either party's witnesses are outnumbered, the party may ask of the *Tongtong* for a *kilat*. This request is always granted. This ordeal consists in tying a string, or *bejuco*, near the point of a sharp-pointed iron instrument. An old man, in the presence of the *Tongtong*, puts the instrument on the heads of each of the litigants and strikes it with his hand. When this ordeal is employed,

1. From C. R. Moss, "Nabaloi Law and Ritual", University of California Publication in American Archaeology and Ethnology, 1920, vol. XV, p. 265, as summarized in J. H. Landmann, "Primitive Law, Evolution, and Sir Henry Maine", Michigan Law Review, 1930, vol. XXVIII, p. 404.

the individuals subjected to the ordeal pray, "You the Sun, cause the blood to come out from the head of the one who is at fault." The man whose head bleeds more is pronounced guilty.

Sometimes, the *Tongtong* may employ the ordeal of wrestling to decide quarrels concerning debts. The claimant prays, "You the Sun, may I win at wrestling because the debt is due me!" The defendant prays, "You the Sun, may I win at wrestling because I do not owe the debt!" The winner gets judgment from the *Tongtong* court.

Sometimes, a litigant requests the *bagto* of the *Tongtong*. If granted, camotes of exactly the same weight are given, one to each of the two litigants. They then sit on the ground, arms-length apart, back to back. Then both pray, "You the Sun, if it was my fault, may I be hit with the camote!" The plaintiff throws it first, then the other. The individual hit by the other loses. The tossing of the camotes decides the controversy when one strikes the other and the other does not strike him.

When there is a quarrel about larceny, the *Tongtong* may decide upon the ordeal of *bakal ni bakas*. The indicted persons are subjected to the rice-eating ordeal. The same amount of rice is given to each of the persons suspected. All of them pray, "You the Sun, may I chew the rice well, because I am not at fault!" They masticate the rice the same length of time and then expectorate the crushed rice on separate plants. The examination by the *Tongtong* determines who has better chewed the rice and, by this token, the individual who wins the litigation.

If one of the individuals has no teeth, the *Tongtong* may decide upon the ordeal of *sabuk*, or hot water. All the suspected individuals of a larceny pray, "You the Sun, may my arm not be scalded, because I am not at fault!" They all thrust their hands up to the wrist into the hot water. The one scalded most is pronounced guilty and is punished.

Sometimes, the *Tongtong* invites the *mambunong*, or magician, to determine the thief by the *buyon*. An iron is suspended by a string while he prays, "Cause the iron to show who did the steal-



ing!" He announces the names of all the suspects. Should the iron move when he calls the name of a person, he is pronounced the thief. He then declares his guilt whether he actually committed the larceny or not, since he believes the Kabunian is omniscient.

## 126. A Day in Court at Fiji.<sup>1</sup>

### *The Presiding Judge plays on a Jewsharp.*

[The narrator is the British administrative official who sits as assessor with the native Provincial Court here described:]

A bright sky vying with the sea for blueness, a sun whose rays are not too hot to be cooled by the sea-breeze, the distant roar of the great Pacific rollers as they break in foam on the coral reef, the whisper of the feathery palms as they wave their giant leaves above yonder cluster of brown native huts,—all these form a picture whose poetry is not easily reconciled with the stern prose of an English court of law. It is, perhaps, as well that the legal forms we are accustomed to have been modified to meet the wants of this remote province of the Queen's dominions,—for the spot we are describing is accounted remote even in remote Fiji, and the people are proportionately primitive.

The natives of Fiji are amenable to a criminal code known as the Native Regulations. These are administered by two courts,—the District Court, which sits monthly and is presided over by a native magistrate; and the Provincial Court, which assembles every three months before the English and native magistrates sitting together. From the latter there is no appeal except by petition to the governor, and it has now become the resort of all Fijians who are in trouble or consider themselves aggrieved.

For several days witnesses and accused have been coming in from the neighboring islands, and last night the village cries proclaimed the share of the feast which each family was called upon to provide. The women have been busy since daylight bringing in yams, plantains, and taro from the plantations; while the men

1. From *Anon.*, "A Court-Day in Fiji", *The Green Bag*, 1891, vol. III, p. 324; reprinted from *Cornhill Magazine*, n. d.

were digging the oven and lining it with stones that when heated will cook the pigs to a turn.

But already the height of the sun shows it to be half-past ten, and the District Court has to inquire into several charges before the Provincial Court can sit. The order is given to the native police sergeant to beat the "lali," and straightway two huge wooden drums boom out their summons to whomever it may concern. As the drum-beats become more agitated and pressing, a long file of aged natives, clad in shirt and "sulu" of more or less irreproachable white, is seen emerging from the grove of cocoanut-palms which conceal the village. We have but just time to shake hands with our dusky colleague, a shrewd-looking old man with grizzled hair and beard carefully trimmed for the occasion, when the crowd begins to pour into the court-house. . . .

The court-house, a native building carpeted with mats, is now packed with natives sitting cross-legged, only a small space being reserved in front of the table for the accused and witnesses. The Magistrate takes his seat; and his scribe, sitting on the floor at his side, prepares his writing materials to record the sentences. The dignity with which the old gentleman (Vatureba by name) adjusts his shirt-collar and clears his throat is a little marred when he produces from his bosom, what should have been a pair of *pince-nez*, seeing that it was secured by a string round his neck, but is in fact a Jew's-harp! With the soft notes of this instrument the man of law is wont to beguile the tedium of a dull case. But although the spectacle of Lord Coleridge gravely performing on the Jew's-harp would at least excite surprise in England, it provokes no smile here.

The first case is called on. Reiterated calls for Samuela and Timothe produce two meek-faced youths of eighteen and nineteen, who, sitting tailor-fashion before the table, are charged with fowl-stealing. They plead "not guilty;" and the owner of the fowls, being sworn, deposes that having been awakened at night by the voice of a favorite hen in angry remonstrance, he ran out of his house, and after a hot chase captured the accused,—red-handed in two senses, for they were plucking his hen while still alive. Quite un-

moved by this tragic tale, Vatureba seems to listen only to the melancholy tones of his Jew's-harp; but the witness is a chief, and a man of influence withal, and a period of awed silence follows his accusation, broken only by a subdued twanging from the bench. But Vatureba's eyes are bright and piercing, and they have been fixed for some minutes on the wretched prisoners. He has not yet opened his lips during the case; and as the Jew's-harp is not capable of much expression, it is with some interest we await the sentence.

Suddenly the music ceases, the instrument is withdrawn from the mouth, the oracle is about to speak. Alas! he utters but two words, "Vulle totu" (three months), and there peals out a malignantly triumphant strain from the Jew's-harp. But the prosecutor starts up with a protest. One of the accused is his nephew, he explains, and he only wished a light sentence to be imposed. Three months for one fowl is so severe; besides, if he has three months, he must go to the central gaol, and not work out his sentence in his own district. Again there is silence, and the Jew's harp has changed from triumph into thoughtful melancholy. At length it is again withdrawn, and the oracle speaks again: "Bogi totu" (three days).

The prisoners are pounced upon and dragged out by the hungry police, and after a few more cases the District Court is adjourned to make way for the Provincial. The rural police, a fine body of men dressed in uniform, take up positions at the court-house doors, and we take our seat beside our sable colleague at the table. A number of men of lighter color and different appearance are brought in, and placed in a row before the table. These are the leading men of the island of Nathula, who are charged with slandering their "Buli" (chief of district). They have, in fact, been ruined by a defective knowledge of arithmetic, as we learn from the story of the poor old Buli, whose pathetic and careworn face shows that he at least has not seen the humorous side of the situation. It appears that a sum of seventy pounds, due to the natives as a refund on overpaid taxes, was given to the Buli for distribution among the various heads of families. For this purpose he summoned a meeting, and the amount in small silver was turned out on the floor to be

counted. Now, as not a few Fijians are hazy as to how many shillings go to the pound, it is not surprising that the fourteen or fifteen people who counted the money made totals varying from fifty to one hundred pounds. They at once jumped to the conclusion that the Buli, who was by this time so bored with the whole thing that he was quite willing to forego his own share, had embezzled the money; but to make suspicion a certainty, they started off in a canoe to the mainland to consult a wizard. This oracle, being presented with a whale's tooth, intimated that if he heard the name of the defaulter who had embezzled the money, his little finger, and perhaps other portions of his anatomy, would tingle ("kida"). They accordingly went through the names of all their fellow villagers, naming the Buli last. On hearing this name the oracle, whose little finger had hitherto remained normal, regardless of grammar, cried out, "That's him!"

On their return to Nathula they triumphantly quoted the oracle as their authority for accusing their Buli of embezzlement. The poor old gentleman, wounded in his tenderest feelings, had but one resort. He knew *he* hadn't stolen the money, because the money hadn't been stolen at all; but then who would believe his word against that of a wizard? And was not arithmetic itself a supernatural science? There was but one way to re-establish his shattered reputation, and this he took. His canoe was made ready, and he repaired to the mainland to consult a rival oracle named "Na ivi" (the ivy-tree). The little finger of this seer was positive of the Buli's innocence; so that, fortified by the support of so weighty an authority, he no longer feared to meet his enemies face to face, and even to prosecute them for slander. As the Buli was undoubtedly innocent and had certainly been slandered, the delinquents are reminded that ever since the days of Delphi seers and oracles have met with a very limited success, and are sentenced to three months' imprisonment.

And now follows a real tragedy: The consideration enjoyed by the young Fijian is in proportion to the length and cut of his hair. Now these are evidently dandies to the verge of foppishness. Two of them have hair frizzed out so as to make a halo four inches deep round the face, and bleached by lime until it is graduated from

deep auburn to a golden yellow at the points. Pounced on and dragged out of court by ruthless policemen, they are handed over to the tender mercies of a pitiless barber, and in a few moments they are as crest-fallen and ridiculous as that cockatoo who was plucked by the monkey. The self-assurance of a Fijian is as dependent on the length of his hair as was the strength of Samson.

But now there is a shrill call for Natombe; and a middle-aged man of rather remarkable appearance is brought before the table. He is a moutaineer, and is dressed in a rather dirty suly of blue calico, secured round the waist by a few turns of native bark cloth. He is naked from the waist upward. The charge is practising witchcraft ("drau ni Kau"). But it appearing that the whole ceremony was a decidedly tame affair, the accused is acquitted,—to be condemned by the other tribunal of public opinion, which evidently runs high. . . .

The dread powers of our Court having thus been vindicated, the crier proclaims its adjournment for three months. The spectators troop out, to spend the rest of the day in gossiping about the delinquents and their cases. The men who have been sentenced are already at work weeding round the court-house,—subjects for the breathless interest and pity of the bevy of girls who have just emerged from court, and are exchanging whispered comments upon the alteration in a good-looking man when his hair is cut off. None are left in the court-house but ourselves, the chiefs, and the older men. The table is removed, and the room cleared of the paraphernalia of civilization. Enter two men bearing a large carved wooden bowl, a bucket of water, and a root of "yagona," which is presented to us ceremoniously, and handed back to some young men at the bottom of the room to chew. Meanwhile conversation becomes general, witchcraft is discussed in all its branches, and compassion is expressed for the poor sceptical white man. "Sulukas" (cigarettes rolled in banana leaves) are lighted; the chewed masses of Yagona root are thrown into the bowl, mixed with water, kneaded, strained, and handed to each person according to his rank to drink; tongues are loosened, and it is time to draw the meeting to a close.

## 127. Litigation among the Ifugao in the Philippines.<sup>1</sup>

### *The Professional Go-Between as indispensable, and the Wrestling Match as an Ordeal.*

[The narrator lived eight years among the Ifugao, and, though they are head-hunters, he reports them as well-developed "in the way of happiness and true freedom".]

*Collective procedure.* Legal procedure is by and between families; therefore a family should be "strong to demand and strong to resist demands." A member of an Ifugao family assists in the punishment of offenders against any other member of his family and resists the punishment of members of his family by other families. . . .

The first step in any legal procedure is to consult with one's kin and relatives. In initiating steps to assess a fine or collect an indemnity, the next step is the selection of a *monkalun*.

#### The Monkalun or Go-Between

*Nature of his duties.*—The office of the *monkalun* is the most important one to be found in Ifugao society. The *monkalun* is a whole court, completely equipped, in embryo. He is judge, prosecuting and defending counsel, and the court record. His duty and his interest are for a peaceful settlement. He receives a fee, called *lukba* or *liwa*. To the end of peaceful settlement he exhausts every art of Ifugao diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, insinuates. He beats down the demands of the plaintiffs or prosecution, and bolsters up the proposals of the defendants, until a point be reached at which the two parties may compromise. If the culprit or accused be not disposed to listen to reason and runs away or "shows fight" when approached, the *monkalun* waits till the former ascends into his house, follows him, and, *war-knife in hand*, sits in front of him and compels him to listen.

The *monkalun* should not be closely related to either party in a controversy. He may be a distant relative of either one of them.

1. From R. F. Barton, "Ifugao Law", University of California Publications in American Archaeology and Ethnology, 1919, vol. 15, p. 14.

The *monkalun* has no authority. All that he can do is to act as a peace making go-between. His only power is in his art of persuasion, his tact and his skillful playing on human emotions and motives. Were he closely related to the plaintiff, he would have no influence with the defendant, and *mutatis mutandis* the opposite would be true.

Ultimately in any State the last appeal is to a death-dealing weapon. . . . But the accuser is usually not over anxious to kill the accused. Should he do so, the probabilities are that the kin of the accused would avenge the death, in which case he, the slayer, would be also slain. The kin of each party are anxious for a peaceable settlement, if such can be honorably brought about. They have feuds a-plenty on their hands already. Neighbors and co-villagers do not want to see their neighborhood torn by internal dissension and thus weakened as to the conduct of warfare against enemies. All these forces make for a peaceful settlement. . . .

*Litigants do not confront each other.*—From the time at which a controversy is formally entered into, the principals and their kin are on a basis of theoretical—perhaps I ought to say religious—enmity. A great number of taboos keep them apart. Diplomatic relations between the two parties have been broken off and all business pertaining to the case is transacted through the third party, the *monkalun*. He hears the testimony that each side brings forward to support its contention. Through him each controversant is confronted with the testimony of the other. It is greatly to the interest of the *monkalun* to arrange a peaceful settlement, not only because he usually receives a somewhat larger fee in such case, but because the peaceful settlement of cases in which he is mediator builds up a reputation for him, so that he is frequently called and so can earn many fees. To the end of arranging this peaceful settlement, the *monkalun* reports to each party to the controversy the strong points in the testimony in favor of the other party, and oftentimes neglects the weaknesses. . . .

*Ordeals; Cases in which employed.*—In criminal cases in which the accused persistently denies his guilt, and sometimes in case of disputes over property the ownership of which is doubtful, and in

cases of disputes over the division line between fields, ordeals or trials are resorted to. The challenge to an ordeal may come from either the accuser or the accused. Refusal to accept a challenge means a loss of the case, and the challenger proceeds as if he had won the case. . . .

*Trial by bultong or wrestling.*—This ordeal is used throughout Ifugao, preëminently to settle cases of disputed rice-field boundaries.

The Ifugao clearly recognizes that the processes of nature—land-slides, the erosion of rainfall in wet weather, and caking and crumbling in dry weather—tend to wear away a terrace not maintained by a stone wall. A terrace maintained by a stone wall is a rarity in the Kiangnan district. Should the boundary not be well marked by *paghok*, a dispute is nearly sure to result sooner or later. These disputes are usually settled by wrestling matches. The wrestling matches are usually friendly. The Ifugao believes that the ancestral spirits of the controversants know which party is in the right, that they know just where the true boundary is, and that they see to it that he who is right shall win, provided always that they be invoked with the proper sacrifices; and that they hold up even the weaker of the wrestlers, and cause him to win, provided his cause be just. Notwithstanding this belief, the people are sufficiently practical to demand that the wrestlers be approximately evenly matched. The owners of the adjacent fields may themselves wrestle, or they may choose champions to represent them. Between kinsmen these matches are presumably friendly; and only sacrifices of dried meat are offered the ancestral spirits. But between those not related, there is often a great deal of unfriendly feeling. In this latter case numerous chickens and two or three pigs are sacrificed, and ceremonies like those against enemies are performed.

On the appointed day the two parties meet at the disputed boundary and occupy opposite ends of the disputed land. A party of mutual kin follows along and occupies a position midway between the adversaries. With each party is one of the family priests. Taking betels and dried meat (presuming the contest to be a friendly one) from a head-basket, the priest prays very much as follows:

"Come, Grandfather Eagle, Grandfather Red Ant, Grandfather Strong Wind, Grandfather Pangalina; come Grandmother Cicada, Grandmother Made Happy, Grandmother Ortagon; come, Grandfather Gold, etc. [throughout a list of perhaps a hundred ancestors]. Here are betels and meat; they are trying to take our field away from us. And was it here, Grandmother Grasshopper, that the boundary of the field was? No, you know that it was a double arm's length to the right. Hold us up, you ancestors, in order that *we* may be the ones who give expensive feasts. Exhort [here the priest names over the gods of war and justice] to hold us up. Was it here, Grandfather Brave, that the boundary was when you bought the field? Do not let them take our land away from us, for we are to be pitied. We are sorely tried!"

After the prayers of the priests, each champion is led by one of his kinsmen to the place where the first wrestling is to occur. This leading is very ceremoniously done, and suggests the heralding of the champions in feudal days. The dike of the upper terrace has been cleaned off at intervals of fifteen to twenty-five feet in order that the owner of the upper field may have no advantage. The champions frequently work themselves down half-thigh deep in rice-field mud, water, and slime. Catching fair and even holds, they begin to wrestle, encouraged each by the shouts and cries of his kinsmen and by the calling of the old men and old women on the spirits of the ancestors. Each wrestler tries to push his opponent into the territory that that opponent is defending and to down him there. If A throws B in B's field, ten feet from the line on which they wrestle, A wins ten feet of the rice field at that point. Finally, there is a fall that more than likely capsizes one or both of them in the black mud. One point in the boundary is determined. Frequently the lower terrace is eight or ten feet lower than the upper one, but there are no injuries, for the reason that the mud is at least two feet deep and is a soft place in which to fall.

At every fifteen or twenty feet along the disputed boundary there is another wrestling match. Sometimes the champions are changed. The new boundary runs through every point at which there has been a fall. . . .

*The umpire and the decision.*—The *monkahun* is the umpire in trials by ordeal. He interprets undue haste or a faulty performance as a confession of guilt. On the day following the trial by fire or hot water he goes to the house of the accused and examines the hand and forearm. If he finds white inflamed blisters, he pronounces him guilty. In the case of a duel, he pronounces the one struck by the missile guilty. The Ifugaos believe that the gods of war and justice turn missiles aside from the innocent in these duels. For the umpire to be manifestly unfair, would be for him seriously to imperil his own life.

## 128. Village Justice in Samoa.<sup>1</sup>

### *The Village Assembly Feasts upon the Culprit Family's Property.*

[Samoa, one of the largest Pacific islands, is inhabited by some of the most advanced native tribes, kindred to the Hawaiians. The narrator spent a long period in various Polynesian communities, under an Australian travelling fellowship, and made systematic study on modern anthropological lines of the aboriginal habits and ideas:]

We must next turn to consider the provisions of these societies for the deliberate punishment of specific breaches of the social order.

It has been mentioned already that those of Samoa are by far the most highly developed. Here justice . . . was administered by the *fono* [assembly] which enacted the laws, tried offenders against them, and passed sentence on the guilty. The high chief, although he might dispense punishment for an infringement of his ceremonial rights, seems to have done so merely by virtue of his superior rank, not as a constituted law giver. . . .

The most usual method of settlement of disputes between families was by means of a custom known as *ifonga*. The *matai* [clan-chief] of the offending party went and sat before the house of the

1. From H. Ian Hogbin, "Law and Order in Polynesia", London, Christopher's, 1934, p. 272.

wronged man. All day he remained there in humiliation. If the man was prepared to accept compensation, he invited him inside and gave him food and *kava*. Later a present of fine mats was made. When a more serious crime had been committed, sometimes the whole descent-group followed this procedure. They ran the risk of death, for the injured party was not always prepared to accept compensation. They generally guarded against this risk by posting a spy in the bush to watch his every movement and to give warning if anything suspicious occurred. . . .

When a criminal was to be tried by the village *fono*, all the *matai* assembled on the *malae*, or village square, in a circle, with the accused in the centre. Speeches were made on both sides, the plaintiff usually making the longest speech. If several men were suspected of the same crime, or if the culprit was unknown, an oath was required. All the persons concerned were required to swear by some god that they were innocent. It is said that the guilty one frequently confessed because he feared the vengeance of the god. At times, instead of swearing their innocence, the persons accused were made to dip a knot of sennit into a bowl of kava and then to drink some of the liquid. If any were taken ill or died soon afterwards, the gods were said to be punishing them.

Punishments were decided by the whole *fono*. Light punishments consisted of fines and sentences to perform village work, such as wall building or road making. Heavy punishments were destruction of property and banishment. Once the *fono* had decided that a man was guilty he was punished at once. . . .

In the judicial proceedings of the *fono*, the punishments may be classed under two heads, *o le sala*, and *o le tua*; the former consisting of the destruction of houses, live stock, and plantations, with, at times, the seizure of personal property and banishment; the latter consisting of personal punishment. *O le sala* was generally inflicted by the whole of the available force of the *fono*. If the household was not stronger than the *fono* it would submit tamely, but if it were strong enough to resist there might be a battle. When the punishment was to be carried out, the leading men of the settlement, rising from the place of meeting, proceeded towards the resi-

dence of the obnoxious family, attended by their followers, where they quickly seated themselves upon the ground in full view of the family they had decided to banish. The latter often heard of the sentence in sufficient time to enable them to remove their mats and other household property to a place of safety; but the live stock generally fell into the hands of the expelling party, who reserved them to feast upon after the work of the day.

Formality was still the order of proceeding, and the anxious family had yet a little time to make preparations for their departure, as one of the judicial party rose to make a speech . . . for the benefit of the head of the doomed family, in which he informed him of the decision of the *fono*, and that they had come to enforce it. On the conclusion of this speech one of the judicial party rose up and commenced to ring the breadfruit-trees. . . . The commencement of this work of destruction was either the signal for resistance to be offered, or for the family to gather up their belongings, and remove from the dwelling. . . .

Whilst those proceedings were going on . . . the old men sat around the spot . . . chatting together apparently quite unconcerned, and waiting for the return of the young men who had been dispatched to plunder the taro patches. . . . On the whole of the provisions being collected, they were cooked and eaten by the expelling party, who then returned to their homes.

## 129. The Samoans under Reformed Occidental Procedure.<sup>1</sup>

### *Simplicity vs. Complexity.*

Before the white man came to Samoa, the natives possessed a judicial system which, though based upon the undesirable element of superstitious fear, was all that was required to make them live peaceful and decent lives. . . .

The machinery of their judicial system consisted of oaths, ordeals, and compurgation. When a crime had been committed, an order was given by the chief for all the townsfolk to gather on the

1. From George H. Westley, "Judicial Comedies in Samoa", The Green Bag, 1898, vol. X, p. 515.

village green. Floor-mats were brought from the nearest houses and laid upon the turf, in the shade of a spreading tree. Each villager would then take oath that he was clear of any complicity in the offense—all save the guilty one, who, fearing the vengeance of the *aitu*, the god of the town, would not dare to take the oath of innocence. Another method of discovering the culprit was this. The chief would take a certain plant and chew it, ejecting the juice into the hollow of his right hand. Then extending his arm full length, he would solemnly call over the names of his people; so long as the innocent were named, the fluid in the hollow of his hand would give no sign, but on the mention of the guilty one, the liquor would run over the edge of his hand and up his arm. If several persons were involved in the crime, the degree of each one's guilt was determined by the distance the fluid ran up the chief's arm, before it spilled to the ground.

These and other picturesque methods of determining guilt have gradually been supplanted by the more prosaic modern judicial forms,—not entirely however, for when, by the Berlin Act of 1889, Great Britain, the United States, and Germany concluded to establish in Samoa a Supreme Court in which foreigners could have their disputes settled, it was at the same time agreed that the natives should be allowed, if they chose, to try their own cases in their own peculiar way. . . .

It is not surprising that the Samoans, with their simple methods of determining guilt, should have found it very hard to understand our complicated judicial machinery. On one occasion in trying to conform with unfamiliar methods, they made some very amusing blunders. The case occurred in 1882 or thereabouts, and was this. A young Samoan killed a black boy who was working on a German plantation, and the German consul, hearing of the matter, made the King and government distinctly aware that Germany would require rigorous justice done. Having a desire not to offend that power, the parliament of *faipule* complied with the demand and immediately passed sentence of death upon the murderer. This, however, did not satisfy the consul. He again wrote them saying that he could not agree to the man being sentenced in this

summary manner, and pointed out that civilized legal procedure demanded first a trial and a conviction.

The Samoan authorities complained over this, feeling that the consul was putting them to needless trouble; if the man was hanged what more could be required? Nevertheless they agreed to give the accused a trial and asked the consul to assist them with the indictment and other formalities he had mentioned in his letter. This the consul did, insisting at every step upon a careful attention to judicial routine. The indictment was made out, and the prisoner put upon his defense. He immediately pleaded guilty. He was then told that he must deny his guilt in order that there might be a trial, whereupon the court, the jury, and the witnesses came to the conclusion that the consul had changed his mind and did not want the man convicted. Therefore, every witness gave his testimony and took solemn oath that he had seen the accused "not commit the crime." This brought the representative of Germany to his feet in protest, and the prosecutor, believing he had changed his mind again and wanted to have the prisoner hanged, offered to recall the witnesses and have them swear the exact opposite, that they *had* seen the murderer kill the black boy.

After the consul had expressed his horror of such perjury, a new lot of "witnesses" was called in, the prisoner's guilt was proven, and he was sentenced to death.

Dying is no very hard matter for the Polynesian, and next day the young murderer ascended his scaffold jauntily smoking a cigarette. The rope was adjusted and everything was ready for the fatal drop, when the consul called for a pause in the proceedings. After a lengthy speech upon the enormity of the prisoner's crime, he declared that the German honor was now satisfied, and recommended a commutation of sentence. King Malietoa, after some severe words to the prisoner, commuted the sentence to imprisonment with hard labor for three months. Again the consul rose to his feet in protest; and the sentence was again revised to hard labor for ten years, and the culprit was sent to work immediately in taking down his own gallows.

The following morning he began his sentence with the hard labor of sitting in front of the royal hut and weeding the path wherever he could find a bit of shade. This was repeated for ten days, when an English planter offered to take the man and work out his sentence on the bush estate of Suisinga. To save the cost of keeping the malefactor the authorities accepted the offer, and he had not been there more than a week when he ran away from Suisinga and returned to his own town, where he is to-day held in high honor for his safe passage through white man's law.

*Part VI.*  
*THE*  
*ANCIENT LAW-PEOPLES*



*Chapter 26*

*EGYPT*

## EGYPT

## Chapter 26

130. *A Poor Peasant persistently Appeals his Complaint to the King, B. C. 2700.*  
*The King's Justice, long delayed, Punishes the Oppressor.*
131. *A Protracted Lawsuit over an Inheritance, B. C. 1300.*  
*The Case of Mes vs. Khay.*
132. *The Great Tomb-Robbing Trial, B. C. 1150.*  
*The Mayor's Slandorous Charge is Refuted.*

130. A Poor Peasant persistently Appeals his Complaint to the King, B.C. 2700.<sup>1</sup>

*The King's Justice, long delayed, Punishes the Oppressor.*

[Much of our knowledge of the manners and customs of Ancient Egypt has been gleaned from the popular tales often found in the papyri. These tales, though unhistorical, help to give a life and reality to the Egyptian scene, supplementing the dry official chronicles.

In the present tale, dating from the IXth-Xth dynasties (perhaps B.C. 2700), the essence of the tale (the learned translator points out) is the difference in social position between the Sekhti, or peasant, and the Hemti, or artisan—the “fellah”, and the client or vassal of the noble. The impossibility of getting justice against such a vassal, unless by some extraordinary effort to attract the noble patron’s attention, is the basis of the plot. When the vassal cites to the peasant the proverb, “A poor man’s name is his own affair”, he means that the peasant has no patron or protector who is bound to take up his cause and protect him; so thus the vassal highhandedly impounds the peasant’s asses and drives them into his own fold.

The popular moral of the tale seems to be analogous to that of the parable of the widow and the callous judge in Luke XVIII, 1, viz. that he who seeks justice from the high-placed rulers must courageously persist in his clamor; for, as the judge said to himself in the parable, “because this widow troubleth me with her complaint I will avenge her, lest she wear me out by her continual coming”.]

1. From “Egyptian Tales, translated from the Papyri, First Series, IVth to XIIth Dynasty”, ed. W. M. Flinders Petrie; London, Methuen & Co., 2d ed. 1899, p. 61. This eminent Egyptologist has furnished a very literal translation; so his translation, to make it more easily readable, has here been somewhat paraphrased.

Once there dwelt in the Country of Salt a peasant, called Sekhti, with his wife and children, his asses and his dogs, and he trafficked in all the products of the Salt Country to the province of Henenseten. So on a certain day he set out with his asses, loaded with rushes and salt, with timbers and beans, with building stones and seeds, and other profitable products, to journey south to Henenseten. And as he came near to the estate of Fefa, north of Denat, he met with a man standing at the bank of the canal. This man was Hemti, son of Asri, and a vassal of the King's High Steward Maruitensa. And this Hemti, when he saw the laden asses of Sekhti approaching on the path, was filled with greedy pleasure and said to himself, "O, that some good god would help me to take to myself these goods of Sekhti!"

Now this Hemti's house and land lay next to the dike-bank of the canal, and the path was narrow, no wider than the width of a waist-cloth. On one side of the dike lay the water of the canal, on the other side was the standing corn of Hemti's land. So Hemti bade his servant, "Fetch me quickly a large shawl from my house", which the servant did instantly. Then Hemti craftily spread the shawl full across the path, so that one end touched the water of the canal and the other end touched the standing corn of his field.

So, as Sekhti drew near along the path with his string of asses, Hemti called out to him, "Be careful! Your asses will trample and spoil my shawl." Then Sekhti said, "I will do as you ask, and we will take care not to trample on your shawl". So he led the asses to one side, off the path, among the corn. Then said Hemti, "You are going into my corn, and not on the path!" To which Sekhti replied, "But I am carefully keeping off your shawl, as you asked. I did not wish to enter your cornfield; but as you have stopped up the path with your shawl, how can I help going aside into the field?" Just then one of the asses proceeded to munch some of the tempting corn-clusters. And Hemti shouted, "Now your ass is eating my corn, and I shall impound your ass until you pay me for the damage that the ass has done!"

But Sekhti said, "I am not to blame for lack of care of my ass. It is you that has blocked the path, and thus I had to lead him

through the corn. So what right have you to seize him for taking a mouthful of the corn? This land belongs, I know well, to your overlord Maruitensa, the King's High Steward. He does justice upon robbers in this land; and am I one to submit to be robbed by you?"

Then the wicked Hemti answered, "The proverb says, 'A poor man's name is his own affair'. I am the vassal of that lord Maruitensa, who regards me even as he regards himself". And Hemti thereon, wielding a scourge of tamarisk branches, beat Sekhti all over his body, and seized his asses, and drove them away to pasture. Then Sekhti wept aloud with pain. And Hemti said, "Hold your noise, Sekhti, or I will consign you to the Demon of Silence". Then cried out the peasant Sekhti to the vassal Hemti, "You beat me, you rob me of my goods, and now you would still my cries with the Demon of Silence! O Sir! give me back my property, and I will not complain of the beating!" Thus did Sekhti, the day long, continue to beseech Hemti. But Hemti gave no ear to him.

So Sekhti turned and took his way to Henenseten, resolved to make his plaint to Lord High Steward Maruitensa. And him he found, coming out from the portal of his mansion to embark on his boat and proceed to the Hall of Judgment. "O Sir!" he cried, "stay but a moment! May it please you to listen to my complaint! Let one of your attendants, whosoever you will, be sent to listen to my griefs!" So the Lord High Steward straightway sent an attendant to listen, and to him Sekhti told all the evil that had been done to him.

And when the Lord High Steward Maruitensa reached the Hall of Judgment, he told the noble judges of the evil deeds of Hemti which Sekhti had recounted to him. But they said to Maruitensa, "Pray remember, this Sekhti of yours, the peasant, must bring a witness to his story. Such is our custom for all peasants. Witnesses must come with them, according to ancient custom. Then will it be allowable to punish Hemti for robbing Sekhti of his petty load of salt, etc. If we order him to make redress, he will do so". So Maruitensa, Lord High Steward, held his peace, for he could not answer the noble judges; and he awaited Sekhti.

So Sekhti came again to the Lord High Steward and said, "O my lord! Greatest of the great, protector of the needy, who punishes fraud and encourages justice, who listens to the cries of the wronged, Hear my complaint and do justice. Put an end to my wrongs, and give me redress for my injuries!"

So when Sekhti had spoken thus, the Lord High Steward went straightway to the King Nebkanra, of blessed name, and said: "O King! A peasant Sekhti has come to me, with a story of his wrongs which bears every mark of truth. His goods have been robbed from him, and he has brought his complaint to me". But the King said, "If you ask what is my pleasure, I say, let us see whether Sekhti will renew his complaint [so that we can thus test his sincerity, since he has no witnesses?] So if you wish to see him renew it, give him yet no answer. Write down the story of his complaint, and bring it to me, and I will later attend to it. But meanwhile make provision for the sustenance of his wife and children, and of Sekhti himself also. See that they provide it for him, without letting him know that it comes from you."

So Sekhti received every day four loaves of bread and two draughts of beer, which the Lord High Steward provided for him, through a friend, and the governor of the Country of Salt was ordered to furnish the wife of Sekhti three rations of corn every day.

And Sekhti did indeed come again, and a third time, with his complaint to the Lord High Steward Maruitensa; who told off two of his attendants to go and seize Sekhti and beat him with staves. But he came again and again, even to the sixth time, saying, "O my lord! who punishes fraud and encourages justice . . . as fire roasts raw food and as water quenches thirst, look with favor on my sad lot, fail not to give me satisfaction, do me right and not wrong". But Maruitensa hearkened not yet to his complaint.

Yet Sekhti came again and again, even to the ninth time. Then the Lord High Steward sent two of his followers to bring in Sekhti, who feared indeed that he would again be beaten, as at his third time of complaint. But the Lord High Steward Maruitensa said

to him, "Fear not, Sekhti, for what you have done. Those many and persistent speeches of yours have pleased the heart of the King, and I hereby make oath, as I eat bread and drink water, that your name shall be kept in remembrance forever and ever." "And besides", went on the Lord High Steward, "be assured that you shall hear good news of the issue of your complaint." For the Lord High Steward had caused the story of the complaint in all its details to be inscribed on a clean papyrus-roll, and had sent it to his Majesty King Nebkanra, of blessed name, and the King had said that it was more pleasing to him than anything in the whole land, and had said to Maruitensa, "Do you declare the judgment yourself, for I will leave it to you."

Then the Lord High Steward Maruitensa sent two of his attendants to the Country of Salt, bidding them make a full record of the household and goods of Sekhti, which was in all six persons, and his oxen and goats, his wheat and barley, and his asses and hogs. And to these he added all that belonged to Hemti, which were given over to Sekhti, even all his property and offices. And Sekhti was more beloved of the King than all his other overseers, and he with all his household thereafter ate of all the good things of the King.

### 131. A Protracted Civil Lawsuit over an Inheritance, B.C. 1300.<sup>1</sup>

#### *The Case of Mes v. Khay.*

[This case took place in the reign of Ramses II (say, B. C. 1300). It was an appeal from a prior judgment, forming apparently the fifth stage in a long series of lawsuits over the title to land. Mes, the appellant, asserts that the prior judgment in favor of Khay, the appellee, had been obtained by the use of fraudulent entries in a land register affecting the party's descent and by forged documents of title. The final judgment on this appeal is unfortunately missing in the papyrus; but the parties' briefs, and the abstract of testimony, read as follows:]

1. From the translation of the original document in *Alan H. Gardiner*, "Untersuchungen zur Geschichte und Altertumskunde Aegyptens," Leipzig, J. C. Hinrichs, 1905.

[1. *Brief of the Plaintiff Mes.*] [*a. Early History of the Estates of Neshi.*] What was said by the . . . of the bearer of weapons, who . . . Rameses, Mes.

"As for me, I am the son of Hui, the son of Urnero, the daughter of Neshi. A division of property was made for Urnero and her brothers and sister in the Great Court in the time of Horemheb. They sent the clerical Iniy, who was an officer of the Great Court, to the district of Neshi: and a division was made for me and my brothers and sisters; and they made my mother, the dweller in the town, Urnero, administrator for her brothers and sisters. Then Takharu, the sister of Urnero, pleaded together with Urnero before the Great Court. The court officer was sent forth, and they caused each of the six heirs to take cognisance of his portion. Now the king Amosis I had given . . . arourae of land as a reward to Neshi my father. And further, since king Amosis I, this land was held by one heir after another until this day. Then Hui, my father, and his mother Urnero pleaded together with their brothers and sisters before the Great Court and the Court of Memphis . . . writing.

"Then my father Hui died."

[*b. The Litigation between Nubnofret and Khay.*] "And Nubnofret my mother came to till the portion of Neshi my [grand] father, but she was not allowed to till it. Then she laid a plaint against the administrator Khay, and they caused them to appear before the Court in Heliopolis in the year 14 . . . of King Ramses II. Then . . . laid a plaint saying: 'Of a truth I am cast forth from this land of Neshi my father.' Then she said: 'Let there be brought to me the registers from the Treasury, and likewise from the Department of the Granary of Pharaoh. For I am well pleased to say, that I am the daughter of Neshi. Division was made for me together with them, but the administrator Khay does not know my right as a sister.'

"The administrator Khay laid a plaint in the Great Court in the year 18, and they sent forth the clerical Amenemiopet, who was an officer of the Great Court, together with him, having a false regis-

ter in his hand, whereby I ceased to be a child of Neshi. And they made the administrator Khay administrator for his brothers and sisters in the place of my heirship, although I was an heir of Neshi my father."

[*c. Mes Appeals against the Judgment in Favour of Khay.*] "And now see! I am in the district of Neshi my [grand] father, in which is the land of Neshi my [grand] father. Let me be examined and let me see whether Urnero was the mother of Hui my father, who was called the son of Neshi, although she is not duly enrolled in the register, which the administrator Khay made against me together with the court officer who came with him. I bring a plaint saying: It is a false register that has been made against me. For verily when I was examined before, I was found to be inscribed. Let me be examined together with my coheirs before the notables of the town, and let me see whether I am the son of Neshi, or whether it is not so."

[2. *Brief of the Defendant Khay.*] [*a. Khay's Version of the Early History of the Estates.*] What was said by the administrator Khay.

"I am the son of the administrator Userhat, the son of Thauir . . . the son of Prehotep. He gave to me his portion of lands in writing in the time of king Horemheb before witnesses; and it was the chief of the stable Hui the son of Prehotep who had tilled it since the time of king Amenothos. I succeeded to him in the time of Horemheb unto this day. Then the scribe Hui and the dweller in the town Nubnofret seized my portion of lands: and she gave them to the artificer Khay iri."

[*b. The Lawsuit between Khay and Nubnofret.*] "Then I laid a plaint before the Judge in Heliopolis, and he caused me to plead together with Nubnofret before the Judge in the Great Court. I brought my testimonies . . . in my hand since Amosis I, and Nubnofret brought her testimonies in like manner. Then they were unrolled before the Judge in the Great Court. And the Judge said to her: 'These documents were written by one of the two parties.'

"Then Nubnofret said to the Judge: 'Let there be brought to me the two registers from the Treasury and likewise from the Depart-

ment of the Granary.' And the Judge said to her: 'Very good is that which thou sayest.' Then they brought us down-stream to Per-Ramessu. And they entered into the Treasury of Pharaoh, and likewise into the Department of the Granary of Pharaoh, and they brought the two registers before the Judge in the Great Court. Then the Judge said to Nubnofret: 'Who is thy heir among the heirs who are upon the two registers that are in our hand?' And Nubnofret said: 'There is no heir in them.' 'Then thou art in the wrong,' said the Judge to her.

"Then the scribe of the royal table, Kha, the son of Mentuemmin, said to the Judge: 'What is the decision which thou makest with regard to Nubnofret?' And the Judge said to Kha: 'Thou belongest to the Residence. Go then to the Treasury, and see how the matter stands with her.' And Kha went out, and he said to her: 'I have examined the documents. Thou art not inscribed in them.'

"Then they summoned the clerical, Amenemiopet, and they sent him forth, saying: 'Call together the heirs, and show unto them the lands, and make a division for them.' So did they command him together with the Court of Memphis.

"Then I sent the . . . . ., Ruiniuma (?) . . . . . who was overseer of horses. And the officer of the court, Amenemiopet, summoned Mesmen, saying, 'Come': . . . . . Then they summoned him to the West bank. And they gave to me thirteen arourae of land and they gave lands to the coheirs before the notables of the town."

[3. *Evidence.*] "(1) What was said by the goatherd Mesmen: 'By Amon and by the Prince, I speak by the truth of Pharaoh, and I speak not falsely; and if I speak falsely, may my nose and my ears be cut off, and may I be transported to Kush. The scribe Hui was the son of Urnero, and, as they say, the son of Neshi. I saw . . . . . Urnero . . . . . lands.'

"(2) What was said by the administrator Khay:

'By Amon and by the Prince. The scribe Hui was the son of Urnero the daughter of Neshi. And if . . . . . say: "It is not.

truth", then let me be put to confusion. By Amon and by the Prince . . . . . not . . . . . cultivate . . . . . beyond them. Their harvest was taxed . . . . .'

"(3) What was said by . . . . .:

'By Amon and by the Prince, if they examine and if they find that I cultivated . . . . . portion . . . . . me, let me be put to confusion.'

"(4) What said by the priest of the temple of Ptah:

'By Amon and by the Prince, I speak in truth, and I speak not falsely; and if I speak falsely, may my nose and my ears be cut off, and may I be transported to Kush. I knew the scribe Hui the son of Urnero. He cultivated his lands from year to year, and he cultivated them saying: "I am the son of Urnero, the daughter of Neshi" '.

"(5) What was said by the honey-maker of the Treasury of Pharaoh Hori:

'By Amon and by the Prince, if I speak falsely, may my nose and my ears be cut off and may I be transported to Kush. The scribe Hui was the son of Urnero; and moreover, Urnero was the daughter of Neshi.'

"(6) What was said by the chief of the stable Nebnefer:

'Likewise saying: 'As for the scribe Hui, he used to cultivate his lands from year to year, doing all that he desired. And they gathered in for him the harvest of his fields year by year. Then he pleaded together with the dweller in the town Takharu the mother of the officer Smentoui. And then he pleaded together with Smentoui her son, and they gave the lands to Hui, and they were duly confirmed to him.'

"(7) What was said by the . . . . . Buthartef:

'Likewise saying: 'The scribe Hui was the son of Urnero, and Urnero was the daughter of Neshi.'

"(8) What was said by the dweller in the town Peihay:

'By Amon, and by the Prince, if I speak falsely, may I be sent to the back of the house. The scribe Hui was the son of Urnero; and moreover, Urnero was the daughter of Neshi.'

"(9) What was said by the dweller in the town Pipuenmuia:

"Likewise.

"(10) What was said by the dweller in the town Tuy:

"Likewise."

### 132. The Great Tomb-Robbing Trial, B.C. 1150.<sup>1</sup>

#### *The Mayor's Slandorous Charge is Refuted.*

[The vast wealth of golden objects accustomed to be buried with each Pharaoh in his tomb has excited the greed of marauders in all ages, even in the early ones.

In this record of the famous Tomb-Robbing Trial, in the reign of Ramses IX (about B.C. 1150), the incidents of the scandal, echoing down the ages, have been remarkably corroborated by the excavations of modern archaeologists. It seems that in the metropolis of Thebes, where the richly jeweled tombs of the early Pharaohs were located, rumors of the plundering of the tombs came to the ears of Peser, mayor of the East side, and he laid information before the Chief Judge. The tombs were on the west side of the city, under a second mayor, Pewero, apparently a political rival of the other mayor. The Chief Judge sent deputies to inspect the tombs, and some of them were found to be uninjured. Some of Pewero's subordinates, treating this as a vindication of his administration, proceeded to the house of the other mayor, Peser, and exulted publicly, to his chagrin. He angrily retorted that the inspection had been a farce. This slander was reported promptly to the Chief Judge, who then directed a trial of the three coppersmiths, employees of a temple, who had been accused of robbing these particular tombs, and one of whom had confessed when arrested and examined under the lash.

The first passage here quoted shows the method used to test the truth of the coppersmith's confession; the second is the record of the final trial:]

1. From the translation of the original in *James Henry Breasted*, "Ancient Records of Egypt", University of Chicago Press, 1907, vol. IV, §§ 510-534.

[*Examination of the Coppersmith.*] Then the Chief Judge and the butler had the coppersmith taken before them to the tomb, while he was blindfolded as a man. . . . He was permitted to see again, when he had reached them. The officials said to him: "Go before us to the tomb, from which you said: 'I carried away the things'." The coppersmith went before the nobles to one of the tombs of the King's children . . . in which no one was buried, which was left open, and to the hut of the workman of the necropolis . . . which was in this place saying: "Behold, the tombs in which I was." The nobles examined the coppersmith with a severe examination in the great valley, but he was not found to know any place there, except the two places upon which he had laid his hand. He took an oath of the King, L. P. H., that he should be mutilated by cutting off his nose and his ears and placed upon the rack if he lied, saying: "I know not any place here among these tombs, except this tomb which is open, together with the hut upon which I have laid your hands." The officials examined the tombs of the great seats which are in The-Place-of-Beauty, in which the King's-children, king's-wives, king's-mothers, the goodly fathers and mothers of Pharaoh, L. P. H., rest. They were found uninjured.

[*The Trial.*] Year 16, third month of the first season, day 21; on this day in the Great Court of the city; beside the two stelae of . . . the forecourt of Amon in the gate called Praise.

People and nobles who sat in the Great Court of the city on this day:

1. Governor of the City and Chief Judge, Khamwese. . . .
2. The High Priest of Amon-Re, King of gods, Amienhotep. . . .
3. The prophet of Amon-Re, King of gods, scribe of 'The-House-of-Millions-of-Years-of-King-Neferkere-Setepnere, L. P. H., Nesuamon. . . .
4. The King's-butler, Nesuamon, the scribe of Pharaoh, L. P. H. . . .

5. The major-domo. . . .
6. The deputy. . . .
7. The standard-bearer. . . .
8. The mayor. . . .

The governor of the city and Chief Judge, Khamwese, had brought in the coppersmith, Pekharu; the coppersmith, Tharoy; and the coppersmith Pekamen . . . .

Said the Chief Judge to the great nobles of the great court of the city: "This mayor of the city said a few words to the inspectors and workmen of the necropolis, in the year 16, third month of the first season, day 19, in the presence of the King's butler, Nesuamon, the scribe of Pharaoh, L. P. H., delivering himself of slanders concerning the great seats, which are in The-Place-of-Beauty. Now, I, the Chief Judge of the land, have been there, with the King's-butler, Nesuamon, the scribe of Pharaoh, L. P. H. We inspected the tombs, where the mayor of the city said that the coppersmiths . . . . had been. We found them uninjured; and all that he said was found to be untrue. Now, behold, the coppersmiths stand before you; let them tell all that has occurred."

They were examined. It was found that the accused did not know any place in the cemetery of which the mayor had spoken the words. He was found wrong therein.

The great nobles granted life to the coppersmiths . . . . They were reassigned to the High Priest of Amon-Re, King of gods, Amenhotep, on this day.

The documents thereof are: one roll; it is deposited in the office of the Chief Judge's archives.

## *Chapter 27*

# *MESOPOTAMIA*



## MESOPOTAMIA

## Chapter 27

133. *A Case of Assault in King Hammurabi's Time, B. C. 1950.*  
 134. *A Lawsuit over a Will, B. C. 2060.*  
*The Witnesses make Oath before the Sun-God Shamash.*  
 135. *An Action for Non-Payment of Sale-Price of Land, B. C. 2000.*  
*One Priestess Buys from Another Priestess.*

133. A Case of Assault in King Hammurabi's Time, B.C. 1950.<sup>1</sup>

[The following court-record, from the Hammurabi period (say B.C. 1950), was found at Tel Saba in the Mesopotamian lowlands, on the eastern border of Irak. It consisted of a 20-line tablet in cuneiform writing. Note that the court was held at the great city-gate, as was the custom in King David's day in Judaea, and still is the custom in Morocco:]

Bir-ilisu, an Amorite feudatory, assaulted Iahusina, the offspring of Abil-ilišu, and also acted in a hostile manner. He asserted: "I did not strike." The prefect and the judge brought Bir-ilisu, the Amorite feudatory, to the Gate of Ishtar. He presented himself [in court], pleaded, and [was allowed to] go to and fro [pending trial]. The father did not bring accusation, nor did he appear [in court]. Defendant did not dispute [the second charge], and he shall pay three and one-third shekels of refined silver.

[Signed, the Judge] Sêlibu, [his assistants] Ili-tilati and Siqlum the son of Inbuša.

134. A Lawsuit over a Will, B.C. 2060.<sup>2</sup>

*The Witnesses make Oath before the Sun-God Shamash.*

[In the following record (dating about B. C. 2060) of a lawsuit over a will, it would seem that the instruments at issue, literally "contracts of heirship", were in law rather what we should call "testaments", so that the later instrument revoked and annulled the earlier one:]

1. From *Henry Frederick Lutz*, "The Verdict of a Trial Judge in a Case of Assault and Battery", *University of California Publications in Semitic Philology*, 1930, vol. 9, No. 6, p. 379.

2. From the German translation of the original cuneiform in *M. Schorr*, "Altbabylonische Rechtsurkunden aus der Zeit der I. Babylonischen Dynastie," vol. III, No. 53, p. 61 (Vienna, Holder, 1910).

An estate of 1 acre 10 rods of arable land at Bit-agargina adjacent to Ibku-adad, and 1-12 acre 25 rods of arable land, in the fields of the goddess Gula, adjacent to Iluni, were disposed of [to defendants] by Apil-ilishu, son of . . . . . who claimed title under a contract of heirship of a certain date; part of the land being sold for money, and part exchanged. [The plaintiff] Shumum-ilishi (son of Nannar-idinnam), eldest brother [of the above grantor], who claimed the land under an heirship-contract of earlier date, producing the contract, then entered complaint before the judges against Ninib-mushalim, the . . . . ., son of Nannar-tum, who had bought for money from [the above-named claimant] Apil-ilishu the plot of land at Bit-agargina, and against Sag-ninbizu, son of Ili-avele, who had received by exchange the plot of land at the Gula temple.

After the judges had verified the earlier heirship-contract, the defendant [grantee] Ninib-mushalim thus pleaded in person: "After the execution of this earlier heirship-contract produced by you the plaintiff, a later heirship-contract was executed [by the ancestor] to [the above-named] Apil-ilishu [my grantor], for the plots of land at Bit-agargina and at the Gula temple. Witnesses to this transaction are present; summon them and hear their testimony." Thus he pleaded.

Thereupon came forward the witnesses to the later contract, namely, Sag-ninbizu, son of Ili-avele, Su-enkiga, son of Nannar-adab, Ellitum, son of Ninib-medu, and Idin-ishtar, son of Lugal-egen. After the judges had heard their testimony to the later heirship-contract, the judges ordered them to make oath before [the god] Shamash, exalted source of all Light.

Thereupon [the plaintiff] Shumum-ilishi voluntarily announced that he would waive these witnesses' performance of the oath before Shamash, exalted source of all Light. And because he waived the performance of the oath before Shamash, exalted source of all Light, then [the defendant] by consent of [the plaintiff] Shumum-ilishi, paid over to the said Shumum-ilishi 1½ shekels [in settlement of the case].

Hereafter no claim will be made by Shumum-ilishi against Ninib-mushalim for the land at Bit-agargina, nor against Sag-ninbizu for the land at the Gula temple. Nor will Ninib-mushalim make claim against Shumum-ilishi for the 1½ silver shekels,

Oath to this was made by both before the King.

Eight witnesses . . . . . [with their signatures].

On the 28th day of the month Elulum in the year in which King Samsu-iluna set up the two golden thrones for the shrines of Marduk and Zarpanitum.

### 135. An Action for Non-Payment of Sale-Price of Land, B.C. 2000.<sup>1</sup>

#### *One Priestess buys from Another Priestess.*

[The fullest extant record showing the normal course of proceedings in a lawsuit is one dating from about B. C. 2000, in the city of Babylon and the reign of Ammi-ditana. The plaintiff first apparently claims title to a piece of land; then the defendant sets up the execution of the deed; then the plaintiff rests on the allegation of non-payment of price: then the defendant joins issue on this allegation; and the Court finds for the defendant, and requires the plaintiff to execute a release:]

. . . . . [Action for non-payment of sale-price of land, by Ilusha-negal vs. Addi-liblut; opening lines broken off] 1 rod of improved house-lot [being land], which Ilusha-negal, [the plaintiff,] priestess, daughter of Ea-ellazu, had bought from Belizunu, priestess of Zamama, daughter of . . . . ., in the year when King Abi-eshuh . . . . ., being 1 rod of house-lot adjacent on one side to the house of Ili-ikisha son of Idin-shamash, and on the other side to the house of Ili-ikisha son of Itti-marduk-balatu, and on the front to the house of Ili-ikisha son of Idin-shamash, and on the rear to the house of Nabi-ilishu.

1. Revised from the German translation of the original cuneiform by M. Schorr, "Urkunden des Altbabylonischen Zivil- und Prozessrechts", No. 280, p. 300 (Leipzig, Hinrichs, 1913).

[*Defendant Pleads.*] "From the priestess Ilusha-negal daughter of Ea-ellazu, for 15 silver shekels, my wife Belizunu [a different person from the above-named B.], priestess of Marduk, and daughter of . . . , did indeed buy the lot in the year when King Ammi-ditana . . . , and I received the deeds duly executed by seal. And I have as witness Ili-ikisha above-named, possessor by inheritance of the two lots adjacent, who affixed his seal. But now the priestess Ilusha-negal, daughter of Ea-ellazu, is claiming this 1 rod of house-lot, although the executed deed bears her seal."

[*Plaintiff Pleads.*] After he had thus pleaded, the priestess Ilusha-negal, daughter of Ea-ellazu, answered thus in person: "When the 1 rod of improved house-lot, adjacent to 2 rods of house-lot, which I had bought from Belizunu, priestess of Zamama, was sold by me to Belizunu, [the other B.] priestess of Marduk, wife of defendant Addi-liblut, for 15 silver shekels, she did not pay me the 15 silver shekels." Thus the plaintiff replied.

[*Evidence.*] Then the judges called upon [the plaintiff] Ilusha-negal to produce either witnesses that the [defendant] priestess Belizunu had not paid the money, or an instrument of debt for the unpaid price, but she did not produce them, for none came. Then [the defendant] Addi-liblut produced the executed deed for the 1 rod of house-lot, and the judges read it, and called for the testimony of the witnesses signing the executed deed, and they in the presence of the judges stated that the 15 shekels, the price for the 1 rod of house-lot, had been received by [the plaintiff] Ilusha-negal, and that she had acknowledged receipt.

[*Judgment.*] After the judges had examined the facts, they imposed a fine on [the plaintiff] the priestess Ilusha-negal, daughter of Ea-ellazu, because she had denied her authentic seal; and directed that she sign the following release of claim:

[*Release.*] "Hereafter the 1 rod of improved house-lot, adjacent to the house of Ili-ikisha son of Idin-shamash and to the house of Ili-ikisha son of Itti-marduk-balatu and having at the front the house of Ili-ikisha son of Idin-shamash and at the rear the house of Nabi-ilishu, is the purchased property of Belizunu

priestess of Marduk, wife of Addi-liblut; and Ilusha-negal, her children, her brother, and her other kin will make no claim against Belizunu and her husband Addi-liblut."

[*Certificate.*] This they swore to by [the god] Marduk and the king Ammi-ditana, in the presence of . . . [here follow the names and titles of eight judges and a chief judge].

Certified by Gimil-marduk, clerk of court, and Belsunu, assistant.

[*Seals.*] . . . [here follow eleven seals, first the plaintiff, then seven of the Judges, then two other persons, then the plaintiff again.]

*Chapter 28*  
*JUDAEA*

## JUDAEA

136. The Case of Zelophehad's Daughters:<sup>1</sup>*An Appeal to Moses is Successful.*

[The narrator, professor of civil procedure in the University of Pennsylvania Law School, was in his day a leading master of ancient Hebrew law. Here he elaborates the text of the Biblical account of this trial.]

This case is unique. It is the only reported case in the Bible in which property rights are decided by a regular judicial proceeding, and in which the parties are known. It is unique, furthermore, because of the re-opening of the case upon the petition of the defendants, and the intrusion of a political question to modify the original decision. The case is reported three times, a fact which sufficiently indicates its importance, in Numbers xxvii, 1-11, xxxvi, 1-13, and in Joshua xvii, 1-6. . . . The report in Numbers xxvii begins thus:—

“Then came the daughters of Zelophehad, the son of Heph-  
er, the son of Gilead, the son of Machir, the son of Manasseh,  
of the families of Manasseh, the son of Joseph; and these are  
the names of his daughters: Mahlah, Noah, Hoglah, and Mil-  
cah and Tirzah.” . . . “And they stood before  
Moses, and before Eleazar the priest, and before the princes  
and all the congregation, by the door of the tabernacle of the  
congregation.”

The High Court before which this case was presented consisted of Moses, representing the political power; Eleazar, the high priest, representing the ecclesiastical power; the princes or chieftains, representing the tribal organizations; and the “congregation,” the

1. From *David Werner Amram*, “Chapters from the Biblical Law”, *The Green Bag*, 1900, vol. XII, p. 5.

## Chapter 28

- 136. *The Case of Zelophehad's Daughters.*  
*An Appeal to Moses is Successful.*
- 137. *King Solomon as a Shrewd Judge*, B. C. 960.  
*The Case of the Two Mothers.*
- 138. *The Trial of Susanna for Adultery*, B. C. 600.  
*Young Daniel saves Susanna by exposing the False Witnesses.*
- 139. *Trials before the Sanhedrin.*

meaning of which is not clear. . . . The Court sat at the door of the sanctuary. Anciently the judgment place was at the gate of the town, where the market place was; later on it was at one of the gates of the city; and finally the notion that judgment is spoken at the gate had become so familiar that when the Court was removed to the sanctuary at Jerusalem, it sat at the door of the sanctuary, even as in the report of this case it sat at the door of the tabernacle in the wilderness. The five women then approached the court in session

"saying, Our father died in the wilderness, and he was not in the company of them that gathered themselves together against the Lord in the company of Korah,"

hence was not attaint and could transmit his inheritance, "but died in his own sin," a natural death, "and had no sons." Hence his inheritance would, under the old law, descend to collateral kinsmen, and the name of the deceased would be forgotten in his family.

Against this his daughters protested, "Why should the name of our father be done away from among his family because he hath no son? . . . Give unto us, therefore, a possession among the brethren of our father." Relying upon a rule of inheritance peculiar to their tribe, contrary to the immemorial rule by which property descended to the heirs male, to the exclusion of the women, and resting upon the simple justice of their contention, these five women were emboldened to present their claim. . . . At any rate, the problem presented to the Court was not one to be dismissed by mere reference to the law limiting the right of inheritance to the males, and the Court retired to consult.

"And Moses brought their cause before the Lord." If we follow the traditional orthodox interpretation of this verse, it means that Moses went to consult God to obtain light in this case, and, as the next verse shows, God gave him a decision. . . . In the Talmud we find that the general dictum, "the words of the rabbis are as acceptable as the words of the Torah," means simply that the rabbis, by virtue of the fact that they were the lawful judicial authorities, had the right to render decisions, and that their

decisions had the same force as the written word of God. . . . Now, after Moses had "consulted God" he reached a decision;

"and the Lord spake unto Moses, saying, The daughters of Zelophehad speak right; thou shalt surely give them a possession of an inheritance among their father's brethren; and thou shalt cause the inheritance of their father to pass unto them."

Thus far the decision in this case. No reason is assigned for it, and no general principle is laid down as its foundation. . . . But in the report of this case in Joshua xvii, 1-6, the following rule is stated:

"because the daughters of Manasseh had an inheritance among his sons."

It seems to distinguish the tribe of Manasseh from the other tribes, and limit the rule to them. . . .

The decision rendered by the Court was, however, not allowed to rest undisturbed. By it the daughters of Zelophehad had been declared to be the lawful heiresses of their father's estate. The parties aggrieved were the next of kin who, in default of male issue, had, under general immemorial custom, the right of inheritance. They were, therefore, practically the defendants in the original proceeding, which may be likened to our action of ejectment brought by the daughters to try the title to their father's estate. The defendants appealed from the decision, and sought to have the case re-opened (Num. xxxvi, 1-13):

"And the chief fathers of the families of the children of Gilead, the son of Machir, the son of Manasseh, of the families of the sons of Joseph, came near and spake before Moses, and before the princes, the chief fathers of the children of Israel."

The chief fathers were, under the patriarchal system, the representatives of their respective families,—the presidents, as it were, of the several little corporations which constituted the tribe.

"And they said, The Lord commanded my lord to give the land for an inheritance by lot to the children of Israel; and my lord was commanded by the Lord to give the inheritance

of Zelophehad our brother unto his daughters; and if they be married to any of the sons of the other tribes of the children of Israel, then shall their inheritance be taken from the inheritance of our fathers, and shall be put to the inheritance of the tribe whereunto they are received; so shall it be taken from the lot of our inheritance. And when the jubilee of the children of Israel shall be, then shall their inheritance be put unto the inheritance of the tribe whereunto they are received; so shall their inheritance be taken away from the inheritance of the tribe of our fathers."

The point made by the defendants was based upon the fundamental conception of the tribal ownership of land, the individual having the perpetual use thereof in his own family. The land was therefore inalienable except with the consent of the tribe. The decision in Zelophehad's case had unsettled this rule. By making the women absolute heiresses in default of male issue, it subjected the property to the danger of absorption by other tribes in the event of the marriage of an heiress outside of the tribe of her fathers, and there would be eventually a mixing up of tribal lines that would obliterate them altogether. . . .

The Court was impressed with the force of the argument, and apparently held the same conservative view as the defendants concerning the political question involved. It therefore reopened the case and modified the decree already made:

"And Moses commanded the children of Israel, according to the word of the Lord, saying, The tribe of the sons of Joseph hath said well. This is the thing which the Lord doth command concerning the daughters of Zelophehad, saying, Let them marry to whom they think best; only to the family of the tribe of their father shall they marry. So shall not the inheritance of the children of Israel remove from tribe to tribe; for every one of the children of Israel shall keep himself to the inheritance of the tribe of his fathers."

This decision therefore prevented the injury to the tribal rights of the defendants, and established the right of inheritance of the daughters upon the condition that they marry within their own tribe. If they married outside the tribe, they lost their estate.

We are assured, however, that the five young women through whose case the law of succession was established, were wise enough not to forfeit their inheritance; for

"even as the Lord commanded Moses so did the daughters of Zelophehad; for Mahlah, Tirzah, and Hoglah, and Milcah, and Noah, the daughters of Zelophehad, were married unto their father's brothers' sons; and they were married into the families of the sons of Manasseh, the son of Joseph, and their inheritance remained in the tribe of the family of their father."

As in the former decision in this case, the ruling of the Court became the basis for a general statute:

"And every daughter that possesseth an inheritance in any tribe of the children of Israel shall be wife unto one of the family of the tribe of her father, that the children of Israel may enjoy every man the inheritance of his fathers. Neither shall the inheritance remove from one tribe to another tribe; but every one of the tribes of the children of Israel shall keep himself to his own inheritance."

So that the special custom of the tribe of Manasseh, through the medium of the case of Zelophehad's daughters, became the general law for all Israel.

### 137. King Solomon as a Shrewd Judge, B.C. 960:<sup>1</sup>

#### *The Case of the Two Mothers.*

[King Solomon, son of David, reigning perhaps in B. C. 960, became famous in his day for his justice. The following story of his shrewd understanding of human nature in the administration of justice has been transmitted through many countries, in one form or another:]

#### 1. From the Bible, First Book of Kings, Ch. III.

For a similar expedient as chronicled in other and later Oriental annals, see the following: *T. W. Rhys-Davids*, "Buddhist Birth-Stories", ed. 1925, pp. xv, xlii; *Sir J. G. Fraser*, "Folklore in the Old Testament", London, 1918, vol. II, Ch. XI, p. 570; *F. W. Farrar*, "The First Book of Kings", New York, 1903, The Expositors Bible Series, Ch. XXII, p. 123; *Moncure D. Conway*, "Solomon and Solomonic Literature", Chicago, 1899, Ch. II, p. 12.

In Gibeon the Lord appeared to Solomon in a dream by night; and God said, "Ask what I shall give thee." And Solomon said . . . "O Lord my God, Thou hast made thy servant king instead of David my father; and I am but a little child; I know not how to go out or come in. And Thy servant is in the midst of Thy people which thou hast chosen, a great people, that cannot be numbered nor counted for multitude. Give therefore Thy servant an understanding heart to judge thy people, that I may discern between good and bad: for who is able to judge this Thy so great a people?"

And the speech pleased the Lord, that Solomon had asked this thing.

And God said unto him, "Because thou hast asked this thing, and hast not asked for thyself long life; neither hast asked riches for thyself, nor hast asked the life of thine enemies; but hast asked for thyself understanding to discern judgment; Behold, I have done according to thy words: lo, I have given thee a wise and an understanding heart; so that there was none like thee before thee, neither after thee shall any arise like unto thee." . . .

And Solomon awoke; and behold, it was a dream. And he came to Jerusalem, and stood before the ark of the covenant of the Lord, and offered up burnt-offerings, and offered peace-offerings, and made a feast to all his servants.

Then came there two women, that were harlots, unto the King, and stood before him. And the one woman said, "O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house. And it came to pass, the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house. And this woman's child died in the night, because she overlaid it. And she arose at midnight, and took my son from beside me, while thy handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear."

And the other woman said, "Nay; but the living is *my* son, and the dead is *thy* son." And this one said, "No; but the dead is *thy* son, and the living is *my* son."

Thus they spake before the king.

Then said the King, "The one saith, This is my son that liveth, and thy son is the dead; and the other saith, Nay; but thy son is the dead, and my son is the living." And the King said, "Bring me a sword." And they brought a sword before the King. And the King said, "Divide the living child in two, and give half to the one, and half to the other."

Then spake the woman whose the living son was unto the King, for her bowels yearned upon her son, and she said, "O my lord, give her the living child, and in no wise slay it." But the other said, "Let it be neither mine nor thine, but divide it."

Then the King answered and said, "Give *her* the living child, and in no wise slay it; she is the mother thereof."

And all Israel heard of the judgment which the King had judged; and they feared the King: for they saw that the wisdom of God was in him, to do judgment.

[*A Chinese Version.*] [The Biblical story of Solomon's wise judgment between the two women claiming the same babe has echoes in the literature of other people's law. The closest parallel is found in Chinese literature. Professor P. G. Sayeki, of the Tokyo Imperial University, sent to the present Editor a report of it in a Chinese book published A. D. 1211, by Kueia Wan-Yung, entitled "Tang yin pi shih", which means (in their figurative style) "Conversations held in the Shadow of an Apple Tree". This book, revised by Wu-no in A. D. 1420, contained 148 cases decided by a governor famous for his justice. The story is as follows:]

When Hoan Pa was Governor of the Province of Yin-chuan, there was a rich man in the province, and his two married sons lived together under the same paternal roof. When the younger brother's wife was pregnant, the elder brother's wife was also with child. But the latter was unfortunate enough to have a miscarriage, whilst the former gave birth to a fine boy. So the elder



brother's wife managed to get possession of the living child, and then insisted that the child was her own. The family quarrel, thus begun, lasted for three years, until finally both parties laid their complaint before the Governor.

After hearing the parties, the Governor-general at once ordered one of his men to take the child in question and leave him alone in the middle of the court-yard and then told the two women that the child would belong to her who will get him first. Both, therefore, ran forward and caught the child by the arm and tried to get him by force.

The Governor-general, however, watched and observed the way they struggled for the prize. The elder brother's wife, the Governor observed, grasped the child's arm with merciless violence, whilst the younger brother's wife held the child's hand tenderly, looking much grieved for the child, lest the child's arms break. Therefore, the Governor, rebuking the elder brother's wife, declared: "You covet the heirship of the family property, and that is why you are trying so hard to get this child. If you were the true mother to the child, you would be careful not to hurt the child in any way, would you not? The case is quite clear to me now."

Upon this pronouncement the elder brother's wife confessed and was convicted.

### 138. The Trial of Susanna for Adultery, B.C. 600.<sup>1</sup>

*Young Daniel saves Susanna by exposing the False Witnesses.*

There dwelt a man in Babylon, called Joacim: and he took a wife, whose name was Susanna, the daughter of Chelcias, a very

1. From "The History of Susanna", in The Apocrypha or Non-Canonical Books of the Bible; Tudor Publishing Co., New York, 1936, p. 245.

The story is laid in Babylon, during the captivity of the Jews, about B.C. 600. The youth Daniel was carried off to Babylon, with his people, B.C. 605, and came to gain the favor of King Nebuchadnezzar, and was given high office. His cleverness in the case of Susanna was perhaps one of the incidents which helped to bring him into prominence.

The Arabian version of this case will be found in the "Book of the Thousand Nights and a Night," translated by Richard F. Burton, Benares, 1885, vol. V, p. 97 (Denver Burton Society's Reprint).

fair woman, and one that feared the Lord. Her parents also were righteous, and taught their daughter according to the law of Moses. Now Joacim was a great rich man, and had a fair garden joining unto his house: and to him resorted the Jews; because he was more honourable than all others. The same year were appointed two of the elders of the people to be judges, such as the Lord spake of, that wickedness came from Babylon from ancient judges, who seemed to govern the people. These kept much at Joacim's house: and all that had any suits in law came unto them.

Now when the people departed away at noon, Susanna went in to her husband's garden to walk. And the two elders saw her going in every day, and walking; so that their lust was inflamed toward her. And they perverted their own mind, and turned away their eyes, that they might not look unto heaven, nor remember just judgments. . . . Then appointed they a time both together, when they might find her alone. And it fell out, as they watched a fit time, she went in as before with two maids only, and she was desirous to wash herself in the garden: for it was hot. And there was nobody there save the two elders, that had hid themselves, and watched her. Then she said to her maids, "Bring me oil and washing balls, and shut the garden doors, that I may wash me." And they did as she bade them, and shut the garden doors, and went out themselves at privy doors to fetch the things that she had commanded them. But they saw not the elders, because they were hid.

Now when the maids were gone forth, the two elders rose up, and ran unto her, saying, "Behold, the garden doors are shut, that no man can see us, and we are in love with thee; therefore consent unto us, and lie with us. If thou wilt not, we will bear witness against thee, that a young man was with thee, and therefore thou didst send away thy maids from thee." Then Susanna sighed, and said, "I am straitened on every side: for if I do this thing, it is death unto me; and if I do it not, I cannot escape your hands. It is better for me to fall into your hands, and not do it, than to sin in the sight of the Lord."

With that, Susanna cried with a loud voice; and the two elders cried out against her. Then ran the one, and opened the garden door. So when the servants of the house heard the cry in the garden, they rushed in at a privy door, to see what was done unto her. But when the elders had declared the matter, the servants were greatly ashamed; for there was never such a report made of Susanna.

And it came to pass the next day, when the people were assembled to her husband Joacim, the two elders came also full of mischievous imagination against Susanna to put her to death; and said before the people, "Send for Susanna, the daughter of Chelcias, Joacim's wife." And so they sent. So she came with her father and mother, her children, and all her kindred. . . . And the elders said, "As we walked in the garden alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in a corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we, and opened the door, and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify."

Then the assembly believed them, as those that were the elders and judges of the people. So they condemned her to death.

Then Susanna cried out with a loud voice, and said, "O everlasting God, that knowest the secrets, and knowest all things before they be; Thou knowest that they have borne false witness against me, and, behold, I must die; whereas I never did such things as these men have maliciously invented against me." And the Lord heard her voice.

Therefore when she was led to be put to death, the Lord raised up the holy spirit of a young youth, whose name was Daniel; who cried with a loud voice, "I am clear from the blood of this woman." Then all the people turned them toward him, and said, "What mean these words that thou hast spoken?" So he, standing the midst of them said, "Are ye such fools, ye sons of Israel, that without

examination or knowledge of the truth ye have condemned a daughter of Israel? Return again to the place of judgment; for they have borne false witness against her."

Wherefore all the people turned again in haste, and the elders said unto him, "Come, sit down among us, and shew it us, seeing God hath given thee the honour of an elder." Then said Daniel unto them, "Put these two aside one far from another, and I will examine them."

So when they were put asunder one from another, he called one of them, and said unto him, "O thou that art waxen old in wickedness, now the sins which thou hast committed aforetime are come to light; for thou hast pronounced false judgment, and hast condemned the innocent, and hast let the guilty go free; albeit the Lord saith, The innocent and righteous shalt thou not slay. Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?" Who answered, "*Under a mastic-tree.*" And Daniel said, "Very well; thou has lied against thine own head; for even now the angel of God hath received the sentence of God to cut thee in two."

So he put him aside, and commanded to bring the other, and said unto him, "O thou seed of Chanaan, and not of Juda, beauty hath deceived thee, and lust hath perverted thine heart. Thus have ye dealt with the daughters of Israel, and they for fear companied with you; but the daughter of Juda would not abide your wickedness. Now therefore tell me, under what tree didst thou take them companying together?" Who answered, "*Under an holm tree.*" Then said Daniel unto him, "Well; thou hast also lied against thine own head: for the angel of God waiteth with the sword to cut thee in two, that he may destroy you."

With that all the assembly cried out with a loud voice, and praised God, who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness by their own mouth; and according to the law of Moses they did unto them in such sort as they maliciously intended to do to their neighbour; and they put them to death. Thus the innocent

blood was saved the same day. Therefore Chelcias and his wife praised God for their daughter Susanna, with Joacim her husband, and all the kindred, because there was no dishonesty found in her.

From that day forth was Daniel had in great reputation in the sight of the people.

### 139. Trials before the Sanhedrin.<sup>1</sup>

[The classic period for the high development of the Jewish law ranges from about B. C. 400 to A. D. 300. During all that period the nation was successively under the suzerainty of Persian, Greek, and Roman rulers. But for its internal government the supreme authority—religious, social and political; legislative and judicial—was vested in a representative body of tribal delegates forming a sort of Senate. This body had apparently passed through several stages of formation and name,—originally called Edah, then Am ha-aretz (Hebrew words, both), then Gerousia (“elders”, in Greek), then Great Synagogue, then Synhedrion (both of these Greek words meaning “assembly”; “synhedrion” was hebraicized into “sanhedrin”; the native Hebrew word being “bet din hagadol”, or “great council”).

This council consisted of 71 members. Under it were intermediate sanhedrin of 23 members; and in the villages, or tribes, met lesser courts of 3 members. The Great Sanhedrin was seated in a semi-circle of 23 members, with two lower circles of 23 each. This council was the supreme court of appeal in all matters of justice.

But during this classic period the law had been developed orally, by constant discussion in the schools conducted by the rabbi; the most famous of these schools is said to have had some 1200 students. Finally the time came when this copious body of oral tradition was reduced to writing. This took two forms,—the Mishna, or code, compiled about A. D. 200, and the Gemara, or commentary, com-

1. From the Babylonian Talmud, Tract Sanhedrin, chap. I, chap. II, par. I, chap. IV, par. I, translated by *Michael L. Rodkinson*, vol. 8, pp. 10, 43, 97, New York, New Talmud Publishing Co., 1902.

piled during A. D. 300–500. Together these two portions are known as the Talmud.

Singularly enough, no records are extant of the trials and decisions of the Sanhedrin. Inquiry among competent scholars has failed to disclose any eye-witness narrative of a trial, either in the Talmud period or in the post-exilic period of the Middle Ages. And so, all that can be offered here (by way of exception to the general plan of the present book) is three passages from the Talmud giving the rules of trial-procedure there laid down. But it is not certain how far any of these rules were actually enforced in practice. As with the Celtic Brehons and the Hindu Brahmans, so also the Hebrew rabbi discussed and recorded hundreds of suppositious cases in elaborate detail, offering authoritative though conflicting pronouncements, with the zest of chambered jurists. But there is no body of trial record showing which of these rules represented the accepted practice in trials. As the learned translator tells us, “this tract says plainly that there are numerous laws written in the Pentatuch which have never occurred, and never will occur, but that they were written merely for study”.

Here are given three typical passages. One deals with the difference between a legal and an arbitral decision; the second with a king as a witness; and the third with the practice in criminal procedure.]

(1) GEMARA. . . . It was said about David [II Sam. viii. 16]: “And David did what was just and charitable unto all his people.” Here, also, “just” and “charitable” do not correspond; as if just, it could not be called charitable, and vice versa. Say, then, it means arbitration, which contains both. The first Tana [jurist], however, who said that arbitration is prohibited, explains the passage thus: He, David, judged in accordance with the strict law—he acquitted him who was right, and made responsible him who was so, according to the law; but when he saw that the culpable one was poor and could not pay, he used to pay from his pocket. Hence he did judgment to one and charity to the other.

Rabbi, however, could not agree with such an explanation, because of the expression, “unto all his people”; and according to

the above explanation, it ought to be "to the poor." Therefore said he: Although he did not pay from his pocket, it was counted as a charitable act that he delivered a theft out of the hands of the defendant.

R. Simeon b. Menasia said: If two persons brought a case before you, before you have heard their claims, and even thereafter, but you are still not aware to whom the strict law inclines, you may say to them: Go and mediate among yourselves. But after you are aware who is right according to the strict law, you must not advise them to mediate, as it is written [Prov. xvii. 14]: "As one letteth loose (a stream) of water, so is the beginning of strife; therefore before it be enkindled, leave off the contest"; which means, before it be enkindled you may advise a mediation, but not after you know with whom the law is. Similar to this is: If two persons came with a case before you, one being mighty (who can harm you) and the other common, you may say to them, "I am not fit to judge between you," so long as you have not heard their claims; or even thereafter, not knowing as yet to whom the law inclines. But you must not say so after you are aware; as it is written [Deut. i. 17]: "Ye shall not be afraid of any man."

(2) MISHNA: . . . A king must not judge, and he is not judged; he must not be a witness, nor be witnessed against.

GEMARA: "*A king must not judge*," etc. Said R. Joseph: This is concerning the kings of Israel; but the kings of the house of David are judged and judge. As it is written [Jer. xxi. 12]: "O house of David, thus said the Lord: Exercise justice on every morning." We see that they did judge; and if they were not to be judged, how could they judge?—as is said above by Resh Lakish.

And what is the reason it is prohibited to the kings of Israel? Because an unfortunate thing happened as follows: The slave of King Janai murdered a person; and Simeon b. Cheta'h said to the sages: Notwithstanding that he is the slave of the king, he must be tried. They sent to the king: Your slave has killed a man. And Janai sent his slave to them to be tried. However, they sent to

him: You also must appear before the court. As it is written [Ex. xxi. 29]: "Warning has been given to its owner" (which means the owner of the ox must appear at the time the ox is tried). He then came and took a seat. Said Simeon b. Cheta'h: King Janai, arise, so that the witnesses shall testify while you stand; yet not for us do you rise, but for Him who said a word, and the world was created. As it reads [Deut. xix. 17]: "Stand before the Lord." And the king answered: It must not be as you say, but as the majority of your colleagues shall decide. Simeon then turned to his right, but his colleagues cast their eyes upon the floor without any answer; and the same did his colleagues at his left. Simeon then exclaimed: You are all troubled in mind (disconcerted)! May the One who rules minds take revenge upon you! Gabriel came then and smote them to the floor, that they died. And at that time it was enacted that a king should neither judge nor be judged, neither be a witness nor be witnessed against. . . .

(3) MISHNA I.: If the conclusion was to condemn, the guilty one was taken out immediately to be stoned. The place where he had to be executed was outside of the court, as it reads [Lev. xxiv. 13]: "Lead forth the blasphemer." One stood at the gate of the court with a flag in his hand, and one who rode on a horse stood so far distant that he could see the signal of the flag in case there were any. And then if one came before the court, saying, "I have something to say in his defence," the man raised up the flag, and he who was on horseback rushed and stopped the procession. And even if the guilty one himself says, "I have something new to say in my defence," he is to be brought back to the court, even four and five times, provided there is something in it which is worthy of consideration. And then, if the court finds that he is not guilty, he is acquitted, and if not, he is taken back to be stoned. And a herald goes before him, heralding: "So and so, the son of so and so, is taken to be stoned, because he committed such and such a crime, and A and B are his witnesses; every one who knows something in his defence may come and tell it before he is executed."

. . . .

GEMARA: R. Aha b. Huna questioned R. Shesheth: How would it be if one of the disciples said, "I have something to say in behalf of the defendant," and thereafter he became dumb? Gestured R. Shesheth, saying: Then we would have to consider that there was some one at the other end of the world who had some defence for him. But, after all, it was said by the disciple that he had a defence, and when he became dumb, would it not be right for the court to investigate again—perhaps they would find out what he meant? . . .

*"Which is worthy of consideration,"* etc. Does the Mishna mean that for the first two times it must be examined while he is yet at his place—if there is something, etc.? Have we not learned in a Boraitha, that the first two times he is to be brought back to the court, even if he does not give a good reason; and only at the third time it is to be examined if there is something in his defence before he is taken back? Said R. Papa: I interpret it that the Mishna means after the second time. . . . Because he is affrighted, he cannot say at the beginning all he wishes to say.

*"Such and such a crime,"* etc. Said Abayi: "The herald must also proclaim the day, the hour, and the place, for the purpose that perhaps there will be found some people who know that the witnesses were not in that place on that day or at that hour, and they will come to make them collusive."

## Chapter 29

### GREECE

## GREECE

140. A Blood-Feud Trial in Homeric Times.<sup>1</sup>*The Popular Tribunal Voices the Judgment.*

[No one now can say whether a real person, Homer, existed; nor can even the date of the composition of the earlier texts of the epic poems, the Iliad and the Odyssey, be positively determined. The range of dates attributed has been between B. C. 800 and B. C. 1200.

At one stage in the plot of the Iliad, Achilles is burning with the desire to avenge his companion Patrocles, slain by Hector. The goddess-mother of Achilles, Thetis, keen to help him, seeks the aid of Haephetus, the fire-god, master of all metal-work, whose forge is in heavenly Olympus. Haephestus makes a splendid shield for Achilles. The shield has twelve compartments of decorative design, each representing a scene from Greek life.

One of these scenes represents a trial in the market-place. This is the earliest specific mention of democratic justice in literature. In the main features it corresponds to the Germanic trial as described in the Nordic sagas of two thousand years later.]

. . . In the market-place

The people were assembled for a lawsuit.

The parties were disputing o'er a sum

Offered to buy off guilt for taking life.

The killer vouches that the sum is fair,

And to the people pleads he should be quit.

The dead man's kinsman says, 'Tis not enough.

Both asked for judgment to decide the case.

1. From *Homer*, "The Iliad," book XVIII, line 497.

There have been many variant versions in the translation of this text. The one here given is the present editor's recension, based on the most plausible version hitherto presented, viz. that of *F. H. Gillingham*, "The Trial Scene on the Shield of Achilles" (Durham, England, University Journal, 1925, vol. XXIV, p. 308).

## Chapter 29

140. *A Blood-Feud Trial in Homeric Times.*  
*The Popular Tribunal voices the Judgment.*
141. *Trial of a Civil Action for Money Loaned, at Cnidos, B. C. 100.*  
*A Banker's Heirs sue the Debtor City.*
142. *Jury Trial Procedure at Athens.*  
*The Trial of Socrates, B. C. 399.*

Anon loud clamor favored each in turn,  
 For each had eager friends among the crowd,  
 And heralds held in check the noisy throng.  
 The elders of the tribe, on polished stones  
 Ranged round the center, sat and gravely heard.  
 Then, with a herald's scepter in his hand,  
 Each elder rose, and in his turn proposed  
 The judgment he advised. And in the midst  
 Two golden talents lay, to be the fee  
 Of that wise elder who should speak  
 The fairest judgment on the pending case.

141. Trial of a Civil Action for Money Loaned, at Cnidos, B.C. 100.<sup>1</sup>

*A Banker's Heirs sue the Debtor-City.*

[The most interesting and nearly complete record of a civil lawsuit dates about B. C. 100, in the island of Cnidos.

This was an action for money brought by the heirs of a banker named Pausimachos. It seems that Pausimachos and Hippocrates, two bankers of Cos, had loaned a large sum of money to the city of Calymna; the loan having actually been underwritten by other citizens of Cos. Hippocrates, one of the lenders, had died; his share of the loan had been one-fifth; and Pausimachos, whose share of the loan was four-fifths, had also died. But, in the meantime, certain payments had been made by the city-debtor to the heirs of Hippocrates. The heirs of Pausimachos now claimed from the city of Calymna the payment of their share, on the ground that the former payments should not be credited, because the loan was not a joint loan, but a several one, and the payments to the heirs of Hippocrates could not be credited against the share of the heirs of Pausimachos.

The dispute having been referred, by arbitration, to the disinterested city of Cnidos, the trial was to take place before the pop-

1. From the French translation of the Greek original in *R. Dareste, B. Houssoullet, and Th. Reinach, "Recueil des Inscriptions Juridiques Grecques"*, 1st series, p. 159 (Paris, Leroux, 1891).

ular jury of Cnidos, which in this case numbered two hundred and four jurymen.

The following is the record of the trial, setting forth the procedure as determined by the counsellors and assembly of Cnidos, and then the judgment:]

[1] [*Rules of Procedure.*] The counsellors of Cnidos will administer the oath to the jurors as follows: "I swear by Jupiter, by the Lucian Apollo, and by the Earth, that I will decide in the case now at issue between the parties, according to what shall seem to me most just. I will not decide merely on the word of any one witness, if that witness does not appear to me to speak the truth. I have not received any gift in connection with this suit, neither I nor any one for me, man or woman, directly or indirectly. May I prosper if I keep my oath, but may disaster strike me if I perjure myself!"

[2] The city ordinances, the summonses, and all other documents that it may be necessary to withdraw from public custody shall be presented to the court by the respective parties but sealed with the seal of the respective cities, in such form as the respective cities shall determine by law. They shall be delivered by the parties to the councillors of Cnidos, and the latter, after breaking the seals, shall take out the documents and deliver them to each of the parties upon the opening of court. Each of the parties shall produce the depositions before the trial opens.

[3] The time for delivery of speeches shall be limited to eighteen clock-measures for each of the parties for the first speech and to ten clock-measures for the second. Each of the parties may bring not more than four attorneys. The attorneys may also be witnesses.

[4] The city ordinances, the summonses, the written formula for the suit, and all other documents taken from public custody shall be read by the clerk furnished by the respective parties, and also the depositions, and during this reading the clock shall be stopped.

[5] As to witnesses, those who are able to be present in person shall give testimony personally before the court; those who are not able to be present in person shall give their testimony to an officer appointed in the respective cities on the 24th day of the month known as Batromios at Calymna and as Caphisios at Cos, in the presence of the opponents, if the latter wish to be present. Witnesses before testifying shall take the oath prescribed by law, viz. that they will tell the truth and that they are unable to attend the trial. The depositions thus taken before such officers shall be sealed by the latter under public seal, and countersealed by the respective parties, if they desire. Copies of these depositions shall be promptly delivered to the parties by the officers. Copies of all depositions received at Cos shall be sent by the officers, some of them sealed under public seal, and others not sealed, to the officials of Calymna within twenty days after taking the deposition, and similarly the officials of Calymna shall send copies of all depositions taken before them at Calymna, some sealed under public seal and others not sealed, to the officials of Cos, within twenty days after taking the deposition; and besides, the said officials for such depositions shall do all that ought to be done by the officials of Cos. Citizens of Calymna who go to Cos to be present at these inquiries shall receive from the city of Cos a safe-conduct. The councillors of Cnidos shall accord to the respective parties at the trial the right to put questions to the witnesses separately, after the opening speeches. The parties may interrogate the witnesses on matters relevant to this lawsuit, but not on other matters.

[6] If the parties do not finish respectively their speeches within the time limited as above, they are not to speak beyond the moment when the water is entirely emptied from the clock. Upon the completion of the speeches, the councillors shall distribute immediately the voting ballots.

[7] [*The Claim.*] . . . . Aristodamos, son of Aglaostratos . . . . children of Diagoras [son of Pausimachos] against . . . . in the presence of the councillors of Cnidos . . . . claims as follows: making first a deduction on the loan of Pausimachos and Hippocrates for the money paid in the mayoralty of

Alkimachos, and also of the talent which the Calymnians claim was paid to them by Pausimachos and Cleomedes; making deduction also for the precious vessels and the forests [given as security for the loan, and realized on by sale] and of the fifth part of the payments which the Calymnians claim to have made to Pausimachos and to Cleomedes [son of Hippocrates], pursuant to the agreement, which they claim to have entered into with Pausimachos and Cleomedes, the whole of which, however, is disputed by the heirs of Cleomedes (and from all these payments must be omitted the part applicable to the loan of Hippocrates); and deducting finally the larger sum which the Calymnians claim to have paid to Cleomedes, and also all other payments mentioned in the communication sent by the city of Cos to the city of Calymna, and received by the agents who had gone to Cos, viz. [giving five names], in which we have written down these payments, crediting them to the assets of the heirs of Hippocrates in the accounting for sums due to Hippocrates by the Calymnians, from and after the month Caphisios of the year when Hermonax was in office:

We claim the balance of this account, reckoned with interest for the share belonging to us. But the Calymnians refuse to pay it, claiming that they have already paid it with interest to Cleomedes, son of Hippocrates, and to Cleophantos, son of Cleomedes.

Total sum claimed by us: thirty talents [about \$36,000].

[8] [*Judgment.*] A vote of judgment being taken, it appeared from the ballots that there were 78 in favor of the claim and 126 against it. Done the 17th day of the month of Elaphrios in the Mayoralty of Alkimachos.

Attorneys, for the children of Diagoras, Philinos, son of Diocles, of Cos; and for the city of Calymna, Hecatonymos, son of Prytanias of Myletus, Exakestos, son of Alkinoos of Calymna, Aratophantos, son of Aristolas of Calymna.



142. Jury Trial Procedure at Athens.<sup>1</sup>*The Trial of Socrates, B. C. 399.*

What were the circumstances and the characteristics of the time? It was a time of unrest, uncertainty, instability, and rapid changes. The oligarchy, or tyranny, which followed the war was at an end, and democracy had lately been restored (403 B.C.). Athens had passed in the course of a few months through every stage of a ruthless terrorism. It had been liberated from a vile despotism. Within a few years four great changes in the constitution had taken place. It was a time of exiles and enforced emigrations, and, as we should describe them, State prosecutions. . . . It was a time of the entrance of new beliefs and ideas; and, as incident to such a juncture, there was a feverish desire to preserve the old Hellenic life, the traditions of the past, the belief in the gods of men's fathers and the old rules of life; a time of sensitiveness and suspicion. . . .

Such were the circumstances in which the charge was brought against Socrates. Now what was the course of procedure and how far did it resemble an English trial?

And first, what was the tribunal? It must be understood that there was no class of professional, permanent judges. Ancient democracy did not know such. Nor did ancient aristocracy; the Roman law was evolved and perfected without a permanent judicial body. At Athens it was conceived that every citizen of ma-

1. From Sir John Macdonell, "Historical Trials", edited by R. W. Lee, Oxford, Clarendon Press, 1927, p. 4, by permission of the publishers.

No contemporary account of Socrates' trial is extant that gives a complete narrative of the issues, the incidents, and the setting. Plato, the only eye-witness, recorded mainly in four of his Dialogues the (supposed) speeches of the accused and his conversations in prison after conviction. A complete account of the trial in every aspect, put together from all the sources and the known rules of legal procedure, is the elaborate and definitive modern monograph of Coleman Phillipson, "The Trial of Socrates" (London, 1928). But the best concise narrative, explaining the procedure and the issues, is the chapter, here quoted, in the posthumous book of Sir John Macdonnell, the distinguished authority on comparative law in the University of London (1845-1921); the editor was the author's learned colleague at Oxford.

ture years was fit to be judge. Every year 6,000 of the age of 30 and upwards were chosen by lot. These 6,000 were the judiciary. They sat in ten sections or classes or committees, the number of which varied from 200 to 2,000; in this case it was probably 501. There was also no sharp separation—it is essential for the understanding of ancient trials to realize this—between the judicial and the legislative assembly; such precise division of powers as we know is a modern conception. . . .

The magistrate who presided had little power; apparently he could not vote. At every turn you find traces of trials being before a popular assembly rather than a Court, in fact, before a crowd rather than a jury; a crowd with its well-known weaknesses, liable to sudden gusts or contagions of feeling; excitable, fickle, and, let me add, a large crowd in a very small community with all the necessary consequences—strong influence of local and temporary feeling; knowledge by the judges of the parties, and often, probably, preconceived opinions as to the facts, and the certainty that the judges had heard much local gossip; no possibility of a change of venue and practically no appeal—absence of some of the conditions essential, we should say, to a fair trial. . . . We shall not see things aright nor shall we be fair to what was done in 399 B.C. if we do not think of the trial as resembling an impeachment before a legislative body rather than proceedings before an English jury.

Each of the jurymen received his two tablets of bronze, with one of which he was to record his vote of condemnation or acquittal. Each of them took an oath, probably two oaths. Modern scholars are not agreed as to the exact form. But probably it ran somewhat thus: "I shall vote in conformity with the laws and with the decrees, those of the people of Athens and the Senate of Five Hundred; in cases which the legislature has not foreseen I will do what is just, not guided by fear or authority; I shall vote only on the questions submitted to the Court; I shall listen with attention to accuser and accused, the plaintiff and the defendant; I swear it by Zeus, by Apollo, by Demeter. If I am true to my oath, may my life be long! If I perjure myself, a curse be on me and my family!"

—an oath as solemn as that gabbled off in our Courts of Law, and one which was a precise monition of the perils to which a popular tribunal is specially exposed.

Who were the prosecutors? In Athens there existed a system of private prosecution. Any one might come forward and bring a charge against any one, as he may do here. There was, however, a deterrent to this course; the private prosecutor was liable, if he did not get a fifth of the votes, to pay a heavy fine—quite as good a check upon ill-judged criminal proceedings as the possibility of bringing an action for malicious prosecution against, it may be, a pauper, a bankrupt, or a man of straw. Usually there was more than one prosecutor, or there might be an assistant prosecutor. . . . In this instance the prosecutors were three: Meletus, Anytus, Lycon.

The case no doubt began with a sworn information before the Archon Basileus, who had jurisdiction over cases of this sort; of its exact nature in this particular instance we know nothing. But if the ordinary course was pursued there was a preliminary inquiry, at which sworn statements in writing were made, documents, and all the exhibits, as we should say, put in a metal or earthen jar and sealed, to be produced in Court.

Next came the indictment, or document corresponding thereto. It was as follows: "Meletus, the son of Meletus the Pithian, deposed on oath the following information: Socrates does evil. He does not believe in the gods whom the city believes in, but introduces other new deities. He corrupts the youth. Punishment—death." . . . Now, to an English lawyer—I might say to every modern lawyer—the brevity and vagueness of the charge seem incomprehensible. According to English Criminal Law it would have been bad from its want of particularity as to time, place, nature of offence and circumstances. . . .

At the actual trial the course of procedure was this: First, the prosecutors spoke, in this case, all three, each probably taking a different line. Then came the witnesses. Who they were and what precisely they said is unknown. We may conjecture what was the line of attack of the prosecution; it is probably to be inferred

from the reply, assuming that Plato's "Apology" records accurately the real speech of the accused.

I need scarcely remind you of the character of the defence. It is manly and uncompromising. . . . Socrates seeks first to remove the weight of prejudice against him, the attacks of his old enemies, going back to the time of [Aristophanes' play of] "The Clouds". He examines the origin of this prejudice. He finds it in this: "I go about the world obedient to the god, and search and make enquiry into the wisdom of any one, whether citizen or stranger, who appears to be wise; and if he is not wise, then in vindication of the oracle I show him that he is not wise; and my occupation quite absorbs me, and I have no time to give either to any public matter of interest or to any concern of my own, but I am in utter poverty by reason of my devotion to the god."

Dealing with the charge brought against him by his accusers in Court, Socrates presses Meletus by searching cross-examination, until he gets from him the answer that he thinks that Socrates did not believe in any gods, and Socrates proceeds to entangle him in a dilemma. Then, in solemn strain, rising above the incident of the hour, and indifferent to his own personal fate, he speaks as judge rather than as accused. He will not buy safety by silence, or by forsaking his divine mission:

"If you say to me, 'Socrates, this time we will not mind Anytus, and you shall be let off, but upon one condition, that you are not to enquire and speculate in this way any more, and that if you are caught doing so again, you shall die';—if this was the condition on which you let me go, I should reply: 'Men of Athens, I honour and love you; but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy.' . . . I am a sort of gadfly, given to the State by God; and the State is a great noble steed who is tardy in his motions owing to his very size, and requires to be stirred into life. I am that gadfly, which God has attached to the State."

He had often refrained from action in obedience to a divine sign: "I have had it from my childhood; it is a kind of voice which, when

it speaks, always turns me back from whatever I am going to do and never urges me to act."

He will make no entreaty for mercy to his judges, who do not sit to make presents of justice but to judge. Finally, and as to the chief charge against him, his answer is: "I do believe in the gods, as no one of my accusers believes in them; and to you and to God I commit my cause to be decided as is best for me and for you."

Such is the substance of the speech for the defence in the "Apology". . . . I conjecture that every lawyer, thinking of the tribunal to which it was addressed, the nature and circumstances of the charge, would say that it was too literary in form, too round and smooth, too devoid of the element of unexpected incidents which never fail to occur in an actual trial. Conceive what was the tribunal, what was the theme and who was the accused. The tribunal a large crowd, not presided over by any one with the powers of control of an English judge, with no doubt many bystanders and spectators; the question one of life and death of a well-known citizen; the theme one of supreme moment to every hearer. It is barely possible that a jury of over 500 persons should have kept silence all that day. "Do not interrupt me", says the accused to his judges. Were there interruptions, and, if so, what were they? With no judge to regulate effectively the proceedings, there must have been some of the interruptions and incidents which never fail to occur even in courts where forms are rigidly observed, and can, if necessary, be enforced. . . .

We know the result. In a court of 501, 281 voted against the accused. It was a narrow majority; a change of 31 votes would have meant acquittal.

Next came the question of punishment, which it was the business of the prosecutors (as in some modern systems of criminal procedure) to propose. We may assume that one or more of the accusers spoke, as they were entitled, in support of the punishment of death. Of this, also, there is no record.

Then came Socrates' reply, in which, as of right, he proposed a counter penalty. It was uncompromising, ironical, and arrogant. If he gets his deserts, he will be maintained henceforth as a bene-

factor at the public expense. He will not be silent; he will continue his work, whatever be the result; the greatest good of man is daily to converse about virtue and all that concerning which he was in the habit of examining himself and others; "the life that is not examined is not life at all." Apparently to meet the wishes of his friends, he suggests a fine of 30 minae.

This line of defence was disastrous; it not merely braved the judges, but put them in a difficulty, because by Athenian practice, if not law, the Court must select between the punishment proposed by the prosecution and by the defendant. According to Diogenes Laertius, it turned 80 of the judges against him.

In the "Apology" are recorded Socrates' last words to the Court. Again he speaks as judge of his judges, but addressing to them no reproaches and resigned to his fate. . . . He is hardly angry with his accusers or those who condemned him. His only request is that they will punish his sons if they care for riches more than for virtue, or reproach them, if they think they are something which they are not. . . .

Thus ended the trial. Socrates was taken to prison, where he remained free to see and converse with his friends, as told in the "Phaedo." He is pressed by them to make his escape, and strong reasons, not wholly personal, are urged for this. But he will not yield or take a course which would be doing all he can to destroy the State. To depart without its consent would be doing wrong: "Neither may any one yield or retreat or leave his rank, but, whether in battle or in a court of law, or in any other place, he must do what his City and his Country order him; or he must change their view of what is just."

And so on the thirtieth day he drank the hemlock. "Such was the end, Echecrates, of our friend; concerning whom I may truly say, that of all the men of his time whom I have known, he was the wisest and justest and best."

*Chapter 30*

*ROME*

## ROME

## Chapter 30

143. *A Stroll through the Courts at Rome, in the Early Empire.*
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143. A Stroll through the Courts at Rome in the Early Empire.<sup>1</sup>

We may rightly admire the profundity and delicacy of the judicial powers possessed by the Romans, who have taught the art of law to all the world. But let us not disguise the fact that this legal genius was saddled with an accompanying evil demon, and that the Romans, jurists and pettifoggers, like the Normans of France, fell an easy prey to their passion for litigation.

This mania is already discernible in the astute law speeches of Cicero. It was disastrous that it got the Urbs in its grip just at a time when the Caesars had proscribed political discussion. From the reign of one emperor to another, litigation was a rising tide which nothing could stem, throwing on the public Courts more work than men could master. To mitigate the congestion of the Courts, Augustus, as early as the year 2 B.C., was obliged to resign to their use the forum he had built and which bears his name. Seventy-five years later, congestion had recurred, and Vespasian wondered how to struggle with the flood of suits so numerous that "the life of the advocates could scarce suffice" to deal with them. In the Rome of the opening second century the sound of lawsuits echoed throughout the Forum, round the tribunal of the *praetor urbanus* by the *Puteal Libonis*, and round the tribunal of the *praetor peregrinus* between the *Puteal* of Curtius and the enclosure of Mar-syas; in the Basilica Julia where the *Centumviri* assembled; and justice thundered simultaneously from the Forum of Augustus, where the *praefectus urbi* exercised his jurisdiction, from the barracks of the *Castra Praetoria* where the *praefectus praetorio* issued his decrees, from the Curia where the Senators indicted those of

1. From *Jérôme Carcopino*, Director of the Ecole Française de Rome, member of the Institute of France, "Daily Life in Ancient Rome: the People and the City at the Height of the Empire"; translated by E. O. Lorimer, edited with bibliography and notes by Henry T. Rowell, professor of Latin in the Johns Hopkins University; New Haven, Yale University Press, 1940; pp. 186-193, in part.

their peers who had aroused distrust or displeasure, and from the Palatine where the Emperor himself received the appeals of the universe in the semicircle of his private basilica, which the centuries have spared.

During the 230 days of the year open for civil cases and the 365 days open for criminal prosecutions, the Urbs was consumed by a fever of litigation which attacked not only lawyers, plaintiffs, defendants, and accused, but the crowd of the curious whose appetite for scandal or taste for legal eloquence held them immobile and spellbound hour after hour in the neighbourhood of the tribunals. The hearings were not easy or proper. They exhausted everybody: pleaders and witnesses, judges and advocates, not excepting the spectators.

Let us attend for a moment a sitting of the Centumviri who exercise their jurisdiction in the Basilica Iulia, their chosen domicile. Leaving the Via Sacra, which flanks the building planned and erected by Julius Caesar and reconstructed by Augustus, we mount the 7 steps leading to the marble portica which framed it. Then 2 further steps take us into the huge hall, divided into 3 naves by 36 brick columns faced with marble. The central nave, which was also the widest, measured 18 metres by 82. The tribunes on the first story which dominated the nave and the side-aisles that flanked it accommodated the male and female spectators who had not been fortunate enough to find places closer to the parties and in the more immediate neighbourhood of the Court.

The Centumviri who composed the Court were not 100 in number as their name might seem to imply, but 180, divided into four distinct "chambers." They took their seats either in separate sections or all four together, according to the nature of the cases which were brought before them. In the latter case the *praetor hastarius* in person presided, on an improvised dais, with his 90 assessors seated on either side of his curule chair. On benches at their feet sat the parties to the suit, their sureties, their defenders, and their friends. These formed the *corona*, or, as we might call it, the "dress circle." Farther off stood the general public. When the four chambers worked separately each had 45 assessors with a de-

centvir as president, and the same arrangement was repeated four times, each chamber in session divided off from its neighbour by screens or curtains.

In either case, magistrates and the public were closely packed and the debates took place in a stifling atmosphere. To complete the discomfort, the acoustics of the hall were deplorable, forcing the advocates to strain their voices, the judges their attention, and the public their patience. It frequently happened that the thunder of one of the defending counsel filled the vast hall and drowned the controversies in the other chambers. In one notorious instance Galerius Tracalus (who had been Consul in 68 A.D.), whose voice was extraordinarily powerful, was greeted with the public applause of all four chambers, three of which could not see him and ought not to have heard him.

Matters were made worse and the noise increased by the enthusiasm of a low rout of claqueurs, whom shameless advocates, following the example of Larcus Licinus, were in the habit of dragging round after them to the hearing of any case they hoped to win, as much to impress the jury as to enhance their own reputation. In vain Pliny the Younger protested against this practice. One day when Domitius Afer was pleading in Quintilian's presence and rejoicing one chamber of the centumviri by his impressive speech and calm delivery, his ears were deafened by immoderate clamour from outside. He stopped speaking in surprise. When silence was restored he resumed the thread of his discourse. New cries. Renewed silence on his part. The same interruption came a third time. Finally he inquired who was pleading next door. "Licinus," was the answer. Then he gave up all attempt to continue and abandoned the suit. "Centumviri," he said, "it is all over with our profession." It was not all over with these bravo criers, these "sophocleis", as they were called in Greek, "signifying that they were applauders by profession," or these "supper praisers" (*laudiceni*) as the Romans called them. Whether it was good or bad, the speech they acclaimed at command brought them their bread and butter; and they could, without breaking the terms of their contract, withdraw their attention from the case as soon as

some counsel who had not hired them took the floor. They remained, on the chance of being further wanted, but returned to their favourite pastimes, such as the games for which crude boards were scratched on the steps of the Basilica Julia. But the hired applauders were the only people in the hall who enjoyed themselves. It is easy to imagine the discomfort and annoyance which a case inflicted on an attentive judge and a conscientious counsel when it had to be conducted in the middle of this mob, to the accompaniment of a continual uproar and periodic outbursts of mechanical applause. . . .

When the Emperor was obliged to summon before him the cases over which he had direct jurisdiction or those which had been appealed from the provinces, he was as much a victim of overwork as the ordinary judges. . . . Sometimes the accused did not hesitate to abuse the Caesar, and the imperial judicial session ended with what we may rightly call "a scene." One of the Oxyrhynchus papyri records that an Egyptian of the name of Appianus, hymnasiarch and priest of Alexandria, had the pride and audacity to stage such a scene with Commodus, who had just sentenced him to death. The Emperor had barely pronounced the sentence when Appianus rose in scandalous defiance: "Do you realise whom you are addressing?" asked Commodus. "Certainly; a tyrant." "Not so," retorted Commodus, "you are speaking to the Emperor." "Certainly not," was the reply. "Your father, the divine Marcus Aurelius Antoninus had every right to call himself Emperor, because he cultivated wisdom, despised money, and loved what was good. But you have no such right, for you are the antithesis of your father: you love tyranny, vice, and brutality."

Thus the Princeps was liable not only to be deafened and exhausted by the speechifying and intrigues of his litigants like any simple centumvir, but to be abused by them in the bargain. While the court of the emperor recalls the magnificence and splendour of Louis XIV, his tribunal suggests more the familiarity and popular tumult which surround the justice of an Eastern pasha seated on his divan in the patio of his seraglio; but it is endlessly complicated

in addition by the subtleties and sonorities of the long-drawn-out Roman procedure. . . .

The Senate assembled in the Curia of Julius Caesar. Its reconstruction under Diocletian has in all probability preserved the original plan and dimensions. It measured 25.5 metres in length and 67.6 in width. It could scarcely have provided space for more than 300 seats distributed in 3 rising tiers, as Professor Bartoli has recently discovered by his excavations beneath the floor of the ancient church of Sant' Adriano. On great occasions, when at least one-third of the total 900 members of the Senate responded to the summons, they must have been as tightly packed as the English Parliament in the House of Lords when the Commons attend to hear the Speech from the Throne. After a sacrifice and preliminary prayers, the senators entered the Curia at the first hour of the day and did not escape till night was falling. They sat again next day, and the day after, and the day after that again, and for several days more. They could not possibly have endured this penitential overcrowding if the rules of the assembly, or rather the customary practice which served instead, had not implicitly permitted them to come and go, vanish and reappear at will. In the hall there was an endless series of discussions, a continual deluge of eloquence and knavery. . . .

What seems inconceivable to us is that the Romans should have tolerated this exhausting system with no attempt to modify or lighten it. Are we to believe that their heads and nerves were more resistant to strain than ours? Or that, having been inured by a century of public readings, they had become case-hardened against exasperation, weariness, and boredom?

#### 144. Lawsuits in the Time of Emperor Trajan.<sup>1</sup>

*Pliny the Advocate chronicles some of his Cases.*

[Pliny the Younger (Caius Plinius Caecilius Secundus), nephew and adoptive son of Pliny the Elder, was trained as an orator un-

1. From "Letters of Pliny", translation by Wm. Melmoth (1746), revised by W. M. L. Hutchinson, vol. I (Loeb Classical Library), 1915, pp. 529, 521, 123; book VI, letter 33 (to Romanus); book VI, letter 31 (to Cornelianus), book II, letter 11 (to Arrianus).

der the famous teacher Quintilian. He made his first appearance at the Bar at the age of 18 (A. D. 80), and became one of the most eminent advocates of the day. His letters to his friends, in which he tells of some of his cases, are not dated; some of the cases may have taken place in the reign of Domitian, some in that of his successor Nerva (A. D. 96-98), and some in that of Trajan (A. D. 98-117); but all the letters were published before A. D. 109. Their historical value is priceless; for there is little other material of the sort in extant Latin literature of the period.

In the three letters here quoted, the first one deals with a case before the popular Court of the Centumviri; the second, with cases before the Council of the Emperor (probably Trajan); and the third, with a case before the Senate as a Court of impeachment.]

[1. *Letter to Romanus*] . . . Take this speech into your hands as one of my best; for I am content to vie only with myself.

'Tis my plea on behalf of Accia Variola, noteworthy from the high rank of the person concerned, the rarity of such a case in litigation, and the amplitude of the tribunal. For here was a high-born lady, wife to a man of Praetorian rank, suing for her patrimony in the Centumviral Court; having been disinherited by a father aged eighty, within eleven days after the enamoured ancient had brought home a step-mother to his daughter. The Court was composed of one hundred and eighty jurors (for that is the number of which its four panels consist); a host of advocates appeared on both sides; the benches were infinitely thronged, and the spacious court was encompassed by a circle of people standing several rows deep. In addition, the tribunal was crowded, and the very galleries lined with men and women, hanging over in their eagerness to hear (which was difficult) and see (which was easy). Fathers, daughters, and step-mothers too, anxiously awaited the verdicts.

These were divergent, two of the panels being for us, and two against us. It is something remarkable and strange that the same cause debated before the same jury, and pleaded by the same advocates, and at the same time, should meet with such contrary judgments—by an accident, which seemed not accidental. The step-

mother, who took under the will a sixth part of the inheritance, lost her cause. So did Suberinus, who though he was disinherited by his father without daring to sue for his own patrimony, had yet the singular effrontery to claim that of another.

I have given you these details, firstly that you might learn from my letter what you could not from my speech; secondly (for I will lay bare the artifice) that you might read my speech more willingly by fancying yourself not a reader, but a spectator of the trial.

[2. *Letter to Cornelianus*] I received lately the most exquisite entertainment imaginable at Centumcellae (as it is called), whither our Emperor had summoned me to his Privy Council. Could anything indeed afford a higher pleasure than to see the Sovereign exercising his justice, his wisdom, and his affability, and that in retirement, where they are laid most open to view? Various were the cases brought before him, which showed under several aspects the virtues of the judge.

That of Claudius Ariston came on first. He is an Ephesian nobleman, of great munificence and unambitious popularity; having thus aroused the envy of persons his opposites in character, they had spirited up an informer against him; such being the facts, he was honourably acquitted.

The next day, Galitta was tried on the charge of adultery. Her husband, a military tribune, was upon the point of standing for office, when she disgraced both him and herself by an intrigue with a centurion. The husband had written of this to the consul's legate, and he to the Emperor. Caesar, having well sifted the evidence, not only broke but banished the centurion. Still, justice was but half satisfied, for the crime is one in which two parties must necessarily be involved. But the husband drew back, out of fondness for his wife, and was a good deal censured for complaisance; for even after her crime was detected he had kept her under his roof, content, it should seem, with having removed his rival. He was admonished to proceed in the suit, which he did with great reluctance: it was necessary, however, that she should be condemned, even against the prosecutor's will. Condemned she was, and giv-



en up to the punishment directed by the Julian law. The Emperor thought proper to specify in his judgement the name of the centurion, and to dwell upon the claims of military discipline; lest it should be supposed that he intended to try all similar causes himself.

The third day an inquiry was begun concerning the much-discussed will of Julius Tiro, part of which was plainly genuine, the other part, it was said, was forged. The persons brought under the charge were Sempronius Senecio, a Roman knight, and Eurythmus, Caesar's freedman and procurator. The heirs had written a joint letter to the Emperor when he was in Dacia, petitioning him to reserve the case for his own hearing. He did so, and upon his return appointed a day for the hearing; and when some of the heirs, as if from respect to Eurythmus, would have withdrawn the suit, he nobly said, "He is not Polyclitus, nor am I Nero." However, he complied with their request for an adjournment, and the time being expired, he now sat to hear the cause. Two only of the heirs appeared; they requested that either all the heirs might be compelled to prosecute, as all had joined in the information, or that they also might have leave to desist.

Caesar spoke with great dignity and moderation; and when the counsel for Senecio and Eurythmus said that, unless the defendants were heard, they would remain under suspicion, "I do not care," said the Emperor, "whether suspicion rests upon your clients; it rests upon myself." Then, turning to us, "Advise me," said he, "what is my proper course, for you see they want to complain that they have not been allowed to prosecute." Then, by advice of the Council, he ordered notice to be given to the heirs collectively, that they should either go on with the suit, or severally show cause for not doing so; otherwise that he would at least pronounce them guilty of calumny.

Thus you see how honourably and seriously we spent our days.

[3. *Letter to Arrianus*] You ever find satisfaction in any thing that is transacted in the Senate, worthy of that august Assembly: for though love of repose has called you into retirement, your heart still retains its zeal for the honour of the public. Accept then the

following account of what lately passed in that venerable body; a transaction for ever memorable by its importance, and not only remarkable by the quality of the person concerned, but useful by the severity of the example.

Marius Priscus, formerly Proconsul of Africa, being impeached by that Province, instead of defending the suit, petitioned that his case might be referred to a special commission. Cornelius Tacitus and myself, being assigned by the Senate as counsel for that province, thought it our duty to inform the House, that the crimes alleged against Priscus were of too atrocious a nature to fall within the cognizance of a commission; for he was charged with accepting bribes to condemn, and even to execute, innocent persons. Fronto Catus replied on his behalf, and moved that the whole inquiry might be confined to the single article of extortion; a master of pathetic eloquence, he raised as it were a gale of compassion to swell the sails of his discourse. The debates grew warm, and the members were much divided in their sentiments. Some declared that the Senate could not legally take further cognizance of the matter; others, that the House was at liberty to proceed upon it, and that punishment of the culprit ought to be made fully equivalent to his guilt.

At last Julius Ferox, the consul-elect, a man of great worth and integrity, proposed that a commission should be granted to Marius provisionally, and that those persons should be summoned to whom it was alleged he had sold innocent blood. Not only the majority of the Senate gave into this opinion; but, after all the dissension that had been raised, it was the only one numerously supported. From whence one could not but observe that sentiments of compassion, though they at first operate with great violence, gradually subside under the quenching influence of reason and judgement: thus it happens, that numbers will defend by joining in the general cry what they would never propose by themselves. The truth is, there is no discerning an object in a crowd; one must take it aside if one would view it in its true light.

Vitellius Honoratus and Flavius Marcianus, the persons who were ordered to be summoned, were brought before the House.

Honoratus was charged with having given three hundred thousand sesterces to procure a sentence of banishment against a Roman knight, as also the capital conviction of seven of his friends. Against Marcianus it was alleged, that he gave seven hundred thousand that another Roman knight might be condemned to suffer various tortures; and the unhappy man was first whipped, afterwards sent to work in the mines, and at last strangled in prison. But death opportunely removed Honoratus from the jurisdiction of the Senate. Marcianus however appeared, but without Priscus. Tuccius Cerealis, therefore, who had been formerly Consul, demanded, agreeably to his privilege as a senator, that notice to attend should be served upon Priscus; either because he thought the latter would excite more compassion, or perhaps more resentment, by appearing; or because, as I am inclined to believe, he thought it most equitable, as the charge was against them both, that they should both join in the defence, and be acquitted or condemned together.

The affair was adjourned to the next meeting of the Senate, which presented a most solemn spectacle. The Emperor himself (for he was Consul) presided. It happened likewise to be the month of January, when town is very full upon many accounts, and particularly owing to the great numbers of senators which that season always brings together; moreover the importance of the cause, the bruit and expectation that had been made by the several adjournments, together with that disposition in mankind to acquaint themselves with every thing great and uncommon, drew people together from all parts. Image to yourself the concern and anxiety we, who were to speak on so grave a charge before such an awful assembly, and in the presence of the Prince, must feel. I have often pleaded in the Senate; as indeed there is no place where I am more favourably heard; yet, as if the scene had been entirely new to me, I now found myself under novel apprehensions. Besides the circumstances I have just mentioned, the difficult nature of the case was present to my mind; a man, once of consular dignity, and a member of the sacred college of Epulones, now stood before me stripped of both those honours. It was an onerous task, I thought, to accuse one already found guilty; one who, lying as he did un-

der the most shocking imputations, was yet as it were shielded by sentiments of compassion towards a convicted person.

However, I collected my wits as best I could; I began my speech, and the applause I received was equal to the fears I had suffered; I spoke almost five hours successively (for four clepsydrae [clock periods] were allowed me in addition to the twelve of the largest scale which had been granted me beforehand); and what at my first setting out had most contributed to raise my apprehensions, proved in the event greatly to my advantage. The kindness, the care of the Emperor (I dare not say his anxiety) were so great towards me, that he frequently spoke to one of my freedmen, who stood behind me, to desire me to spare my voice and breath; imagining I should exert myself beyond what my meagre frame would bear.

Claudius Marcellinus replied in behalf of Marcianus. After which the Assembly broke up till the next day; for had another speech been begun, it would have been cut in two by nightfall.

The next day Salvius Liberalis, a very acute, methodical, spirited, and eloquent orator, spoke in defence of Priscus: and he exerted all his talents upon this occasion. Cornelius Tacitus replied to him with great eloquence, and that stateliness which distinguishes all his speeches. Fronto Catus arose up a second time for Priscus, and, in a very fine speech, endeavoured, as indeed that stage of the case required, rather to soften the judges, than defend his client. Evening suspended, but without breaking off, his oration; accordingly, the division concerned with proofs extended itself to the third day.

It was something very noble, and in the manner of ancient Rome, to see the Senate, adjourned only by the night, thus assemble for three days together. The excellent Cornutus Tertullus, Consul-elect, ever firm in the cause of truth, moved that Priscus should pay into the treasury the seven hundred thousand sesterces he had received, and be banished Italy in perpetuity. He was for giving Marcianus the severer sentence of banishment from Africa also. He concluded with moving that, Tacitus and I having faithfully and diligently discharged the parts assigned to us, the Senate re-

solve we had executed our trust to their satisfaction. The consuls-elect, and those who had already enjoyed that office, agreed with the motion of Cornutus, till Pompeius Collega's turn came: he proposed that Priscus should pay the seven hundred thousand sesterces into the treasury, but suffer no other punishment than what had been already inflicted upon him for extortion: as for Marcianus, he was for having him banished for five years only.

There was a large party for both opinions, and perhaps the majority secretly inclined to the more lax (or more lenient) sentence; for many of those who appeared at first to agree with Cornutus, went over to Collega, who had given his opinion after they gave theirs. But upon a division of the House, all those who stood near the Consuls' chairs went over to the side of Cornutus. Thereupon, those who were allowing themselves to be reckoned with Collega, crossed over to the opposite side, leaving him almost unsupported. He afterwards complained extremely of those who had urged him to this vote, particularly Regulus, whom he upbraided for abandoning him on a motion which he himself had formulated. There is, indeed, such an inconsistency in the general character of Regulus, that he is at once both bold and timorous to excess.

Thus ended this important trial

#### 145. A Civil Trial at Rome under the Later Empire.<sup>1</sup>

*The City Chief Justice reports to the Emperor Theodosius.*

[The narrator, an eminent judge of the latter 300s A. D., and head of the judiciary in Rome, is reporting a case in which the

1. From *Symmachus*, book X, epistle 48, as quoted in full in *M. A. von Bethmann-Hollweg*, "Der Römische Civilprozess", vol. III, App. II, p. 362 (Bonn, A. Marcus, 1866). Quintus Aurelius Symmachus, A. D. 345-410, at the time of this case, was Prefect and head of the city judiciary in Rome. His monument, found in 1617, bears the following inscription: "To Q. Aurelius Symmachus, Quaestor, Praetor, Pontifex Major, Corrector [Governor] of Lucania and the Bruttii, Count of the third order, Proconsul of Africa, Prefect of the City, Consul of his year, a most eloquent orator." His principal extant writings are a collection of epistles in nine or ten books; edited in 1883 by O. Seeck, in "Monumenta Germaniae Historica: Auctores Antiquissimi."

losing party has appealed to the Emperor. At this period the case was heard by the official judge alone from start to finish; the old distinction between the functions of the praetor (preparation) and those of the iudex (trial) had disappeared. The judge, in case of an appeal, makes a report of the entire proceedings, called a "consultation", and transmits it to the Emperor, who would then issue a "rescript."

In the present case, the defendant, for whose high-handed conduct the plaintiff seeks redress, appears to be a person of great local importance, and the judge exhibits a certain obsequiousness in always referring to him by his title of "honorable" ("praeclarissimus," "spectabilis"), and in allowing the appeal though deeming it not allowable under the law.

Notice also that two main issues develop,—one, the possession, on which the plaintiff relied for being reinstated by a purely possessory proceeding, and the other, the title, an issue raised by the defendant.]

To the Divine Theodosius, ever august

From Symmachus, Prefect of the City

I report to You the following case, just decided by me, in which there has been an appeal from my decision.

A certain Scirtius, a man of high rank, brought suit alleging that he had been in possession of a plot of land in the district of Preneste [a suburban town near Rome], from which he had been evicted. It seems that, at the bidding of one Faciana, a lady of senatorial rank, he had in a letter made a gift of one half, i. e. six 'unciae'<sup>2</sup> of this plot to a certain Theseus, and had after the death of the said Theseus confirmed the gift to Theseus' minor children (his heirs) by formal conveyance. The plaintiff now alleges that a few months before suit began he had been forcibly ousted from his possession of the other half by persons acting for one Olibrius, a Roman personage of very high rank.

2. An 'uncia' was one twelfth of a 'jugerum', which was an oblong land-measure of 240 X 120 feet. Thus, one 'uncia' being an area 20 X 120, six 'unciae' would make a square plot 120 X 120 feet.

Upon filing his complaint with these allegations, asking to be reinstated in possession, he received from me the usual provisional order to be placed in possession, notice to be served on whomsoever might be actually in possession. In opposition there appeared first the heirs of Theseus, but later also the process-server summoned one Artemisius, a steward of the honorable Olibrius.

I then directed one of my staff, Ruffinus, to cause to be brought into court the tenants in occupation, so as to get at the facts about the possession. However, when the process-server was in the act of bringing them, they were in disrespect of law forcibly taken from his custody. Leaving aside for the time unpunished this contempt of court, I again directed my staff to summon other necessary witnesses.

No one appeared on behalf of the honorable Olibrius. For the Theseus heirs appeared only one witness, a freedman of Theseus, who, when asked what had become of the tenant-occupants of the premises in question, stated that some of them had gone into hiding, but that the slaves of the plaintiff Scirtius had been taken off to the country-house of the honorable Olibrius. I pass over some of this witness' other statements, because as a freedman of Theseus he was not entitled to full credit; though, having been freed by Theseus, father of the defendant heirs, and not by the heirs themselves, he was not totally disqualified as a witness.

In this situation I caused the Town Councillors of Preneste to be summoned as witnesses. And now for the first time appeared an attorney for Olibrius,—his name was Tarpeius, a person of senatorial rank. And finally, after repeated summonses, came the guardian of Theseus' minor children. The plaintiff Scirtius now was faced with two adversaries, although the latter did not seem entirely in accord with each other in their contentions.

Now it came to the formal investigation into the facts concerning the possession of the land, and after hearing the seriously conflicting statements of the parties, I proceeded to the examination of the witnesses.

I had the Town Councillors called upon separately, as is the custom, in the order of their name and rank. Each of them was asked,

first, who had been the lawful possessors of the land, and next, who had paid the taxes thereon. Upon all of them stating that it was Scirtius, and that he had shared the possession with Theseus, I then asked them when and by whom he had been evicted. They agreed that it was between two and three months before, and that certain men of the honorable establishment [of Olibrius, the defendant] had evicted him.

[Having thus satisfied myself on the issue of possession], at the close of the testimony, copies of the questions and answers being furnished to the parties, I asked the representatives of the defendants if there was anything further they might have to say.

Whereupon the eminent Tarpeius, attorney for the honorable Olibrius, now [set up a claim of title], asserting that six 'unciae' i. e. one half of the land, had come to Olibrius by the death of Theseus. As to this, Scirtius replied that he claimed no more than the other half and did not dispute the half which he had given to Theseus' heirs, and that it was immaterial to him whether it belonged to the Theseus heirs or to the representative of the honorable house [of Olibrius].

The two defending interests now joined in raising a new point, viz. that Scirtius by his letter (written at the request of the lady Faciana) had given one six-'unciae' to Theseus and by his later formal conveyance had given the other six-'unciae' to Theseus' children. Scirtius replied that the six 'unciae' [i. e. the undivided one half] given in his letter was identical with the six 'unciae' described in his formal conveyance, and that the latter had been executed merely to confirm the title. And indeed, since the later document referred to an undivided six 'unciae', we would naturally infer that the donor was reserving to himself the remaining six 'unciae'; else why should he speak of it as "undivided" if there were nothing to be left for himself?

I then pointed out that all this was an issue of title, whereas Scirtius' action was only for restoration of possession. Whereupon the defendants' representatives then cited to me the statute providing that a judge was empowered, though not obliged, in a possessory action, to try the issue of title in the same proceeding if he

saw fit,<sup>3</sup> and they now signified their wish that the title-issue be proceeded with.

However, it appeared that not only did both defendants dispute Scirtius' title, but that they were not in accord with each other as to their respective claims, i. e. though each of them claimed one half of the premises, it did not appear which half each claimed, though between them they claimed the whole.

Wherefore I gave judgment in the possessory action for one half in favor of Scirtius, on the basis of his documents and the testimony of the Town Councillors, while the other half, which Scirtius did not claim, remained assured, both as to possession and title, to his opponents, though without determining which of them. And this issue, now the principal one, I reserved for later inquiry into their respective contentions.

I then proceeded, on the urgent demand of the honorable Olibrius' attorney, to furnish him with a copy of my judgment [for the purpose of an appeal].

Scirtius, however, then raised the point that in a proceeding for summary restoration of possession no appeal is allowable. Nevertheless, next day, at the adjourned hearing, both the honorable Olibrius' attorney and the guardian of the minors joined in their declaration of appeal,—though without yet agreeing as to their respective claims.

Although the Imperial justice may censure me, nevertheless, I report the case even though on an issue of possession no appeal is supposed to be allowable; for by submitting the appeal to your Majesty's gracious attention both the contempt shown to this court and the correctness of the judgment may receive just consideration.

3. On this point, the following passage is interesting, from an opinion of Mr. Justice Oliver Wendell Holmes written 1200 years later: "From the *exceptio spoli* of the Pseudo-Isidore, the Canon law, and Bracton, to the assize of novel disseisin, the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to": *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133, 35 S.Ct. 279, 59 L.Ed. 601, in 1915; holding valid a Louisiana statute forbidding a title-action to be brought by a defendant in a possessory action until after judgment in the latter action).

The foregoing is a summary of the entire proceeding. I annex herewith the entire record. The case now awaits the decision of your Majesty, whose infinite wisdom will enable this case to serve as an example unto all of the protection of just rights.

#### 146. A Trial for Murder at Rome, A.D. 200.<sup>1</sup>

*A Roman Gentleman, disguised as a Slave, barely escapes Torture.*

[The narrator, a young bachelor of rank and wealth, was forced to flee from Rome, to escape death under a false charge of conspiracy against the Emperor Commodus [A. D. 180-192]. After taking refuge in the northern mountains with a band of outlaws, he is captured, without being recognized, and sold as a slave. He returns to Rome, disguised as a slave named Phorbas, in the household of one Falco, a rich man whose hobby was gem-collecting. Phorbas renders special service to Falco, becoming his favorite slave, and Falco makes a will, giving freedom to Phorbas and bequeathing to him the collection of gems.

However, at this juncture, a band of robbers break in and murder Falco, carrying off the gems. Phorbas, coming on the scene shortly afterwards, is suspected of the murder and arrested. Severus is now the Emperor.

Fortunately an old friend, the great physician Galen, recognizing the true identity of Phorbas, visits him in jail and promises to help rescue him.

The trial then follows:]

After a night almost sleepless I was visited at dawn by no less a person than Galen himself.

1. From *E. Lucas White*, "Andivlus Hedullo: Adventures of a Roman Nobleman in the Days of the Empire", New York, E. P. Dutton & Co., 1921, p. 546.

There is no original record extant of a criminal trial at Rome under either the Republic or the Early Empire. But the author of the above remarkable piece of fiction was a scholar whose mastery of all the details of Roman life was unquestioned. His re-construction here of a criminal trial in the period of the emperor Severus is based on a study of all the sources, and may be taken as an accurate account of a typical trial.

"My boy," he said, "you are in a terrible situation, and we were in a quandary how to advise you. . . . You will be tried as a slave accused of murdering his master, and the investigation will include the questioning of every slave in the house at the time of the murder. I know you are aquiver with dread of torture; . . . . We have endeavored to arrange to have you tried by a bunch of jurymen presided over by a praetor, just as if you were a freeman, according to Hadrian's law. But Commodus had repealed all such laws mitigating the rigors of procedure in the case of slaves, and Severus has not had them reenacted. So you will be tried by a magistrate, a deputy of the Prefect of the City, as slaves were tried before Hadrian's time.

"We shall have, at the trial, to cheer you up, to counsel you, and, if necessary, to intervene in your behalf, as clever an advocate as any in Rome. Keep up a good heart, and read these letters."

. . . .

Investigations of murders are prompt in Rome and trials of accused slaves quickly disposed of. Before the next morning was half way to noon, on the fifth day before the Ides of July, I found myself, still shackled, but well fed and well clad, in the Basilica Sempronia, before the magistrate charged with deciding such cases. He turned out to be young Lollius Corbulo, whom I had not set eyes on until he came to know me as Phorbas, for he was an art amateur of high standing, considering his youth.

I never have discovered how much he was influenced by his natural kindness of disposition, how much by personal regard for me, how much by Tanno, acting for himself and Vedia, or whether he had been bribed or not. . . . Anyhow Corbulo gave a demonstration of the great latitude which is permitted both by law and custom to such a magistrate in such a case. He ordered my shackles removed, and, while they were being filed through, sent off three of his apparitors [bailiffs] in charge of Dromo to fetch some of my own garments from my apartments in Falco's house. He went about his investigation like a fair-minded man who meant to favor no one and to ferret out the exact truth.

Corbulo in his full senatorial attire, the broad crimson stripe more conspicuous than the white of his toga, sat in his chair at the center of the apse of the basilica, his apparitors behind him. In the nave of the basilica, surrounded by guards, were herded those members of Falco's retinue who had been in his house at the time of his murder. Further down the nave were many outsiders, come to listen to the trial. In the aisles were gathered hangers-on of the court. . . .

The bare, bleak interior of the ancient, old-fashioned basilica, with its blackened roof-beams, unadorned walls, Travertine columns of the severest Tuscan pattern, and plain window-lattices, made an austere setting for the trial. I saw nowhere any rack, winches, horse, or any other engine of torture; but, while Dromo was gone, four muscular court-slaves came tramping in, each supporting a pole end. The two long poles were passed through the four ear-handles of a bronze brazier all of five feet square, level full of glowing charcoal, the brilliant bed of coals radiating an intense heat perceptible as they passed near me. When they had set it down in full view of all and near the tribunal, one of them shook out and folded four-thick a thin Spanish blanket of harsh wiry wool and spread the square of it by the brazier, squatting on it to tend the coals with a long-handled five pronged altar-hook.

When Dromo returned with my garments and I was clad as Phorbas, Corbulo questioned me as to when Falco had bought me, where and from whom. . . . As to my life with Falco in Africa and at Rome, he questioned me closely. I told him all about Falco's character, his gem-collecting, the effect on him of the murders of [the emperors] Commodus and Pertinax, his forebodings and his utterances to me about his will. When he felt that he knew all I had to tell along these lines, he said: "Now tell me your version of your master's death."

He heard me out and said: "I believe you. You speak like a truth-teller."

He then questioned the janitor, who babbled and cringed, half unintelligibly, but stoutly denying that he had slept at his post on the seventh day before the Kalends of July.

"I am of the opinion," said Corbulo, drily, "that you are lying."

Then to his apparitors he said: "Strip him."

The court-slave, the charcoal-tender, stood up off his folded blanket and shook it out. The janitor, stripped and bound, ankles lashed, hands trussed behind him, was haled towards the brazier. The blanket was flung round him and four apparitors lifted him as if he had been a log and held him near the brazier, the enveloping blanket drawn tight over his left thigh and its outer underside nearest the coals, tilting him sideways to bring the soft thickness of the thigh closest to the heat. They watched the tight blanket over his thigh and moved him a little away from the brazier when the wool began to smoke.

I had never seen nor heard of this kind of torture, but it seemed effectual. The fellow writhed, groaned, squalled and protested. After Corbulo had him brought back before him, he confessed that he had been asleep in his cell from some time before Falco's murder until he was aroused by Dromo, just before the arrival of Caprius and Vespronius.

One by one the other slaves were questioned. Three declared that they had seen the janitor asleep not long before they heard the alarm. Several more testified that the janitor had often been asleep. More than half of them confirmed my story of the theft of the silver on the Nones of May. Except the janitor, not one was tortured, though Corbulo threatened with torture several who hesitated in their testimony.

After the slaves Corbulo questioned Asellio and Lustralis.

Then, when they had stood aside, he gazed about at the spectators in the nave, at the crowd behind them, interested in the next case or in others to come up later, at the hangers-on in the side aisles; for a time, mute, he stared at the glowing charcoal fire in the big brazier.

When he spoke he said:

"It is my opinion that Phorbas is innocent. I have inspected the house where the murder took place. From the condition of the looted rooms it is plain that more jewelry was stolen than any one

man could carry off. Manifestly two men participated in the robbery and murder and escaped with their booty, very likely the same pair who robbed Falco's triclinium on the Nones of May. The janitor's confessed delinquency explains how they entered and got away unhindered and unseen. The dead man's heirs should punish the janitor. I hold no other slave at fault. Has any man anything which he wishes to say before I pass formal judgment for official record?"

Lustralis [a friend of the murdered Falco] asked permission to speak, and amazed me by his fluency, his ingratiating delivery, his vehemence, his ingenuity and the fantastic malignity of his contentions. Corbulo heard him out to the end, unmoving as a statue.

"You do not look like a lunatic nor act like one, Lustralis," he said, "but you talk like one. Phorbas has impressed me by every feature of his tale. He appears to have told the truth. He seems to have been a sincere friend to his late master". . . .

He eyed Lustralis, who spoke further.

"Torture Phorbas!" Corbulo cried. "Absurd! In my court I never torture men like him, any more than if they were freemen. And though it might be imperative to torture him for a confession if all the testimony pointed to his guilt, it is ridiculous to suggest torturing him merely to corroborate evidence demonstrating his innocence.

"I hereby officially as the representative of the Commonwealth, pronounce Phorbas cleared of all charges connected with this case. I hereby enjoin all men to assist the Republic to detect and apprehend the murderers who robbed Falco and killed him."

Lustralis and Asellio looked baffled and sour. A murmur of approval ran through the bystanders. My fellow-slaves congratulated each other and rejoiced, save only the janitor. . . .

I thanked Corbulo, who said: "Don't thank me. I did just what any sane, clear-headed, fair-minded magistrate must do, affirmed the manifest truth."

Galen led me off to a modest apartment near the Carinae.

[The hero of these adventures afterwards regains his freedom, his innocence of the early charge against him is vindicated, and he is restored to his former status and fortune.]

#### 147. Paul the Apostle's Trial for Sedition at Caesarea, A.D. 61.<sup>1</sup>

##### *Paul appeals from Festus unto Caesar.*

[The order of events is as follows: Paul is preaching the new Gospel at Jerusalem; tumult arises, and he is arrested by the Roman chief of police, Judaea being then a Roman province; the chief hears the accusers, and then removes Paul for trial to Caesarea, a Roman city on the coast just north of Jerusalem, and the capital city of the province of Syria, of which Judaea was then a part. The procurator, or Roman governor, of Syria at that time was one Felix, who sends for the accusers and holds a hearing, but decides nothing, and leaves Paul in prison for two years. Felix is then succeeded by Festus, who holds another hearing; the charge being sedition (at that period there was in Judaea a revolutionary movement on foot, which indeed broke out soon after in a rebellion, A.D. 66). Festus also is undecided, and Paul, as a native Roman citizen, now demands to be tried at Rome, where the Emperor Nero then held court. Festus, pending Paul's removal to Rome, calls in Agrippa, the king of the Jewish population, and Paul is given another hearing. His demand to be taken to Rome is conceded.

After his arrival in Rome, he was kept waiting for his trial, was finally tried and (as tradition reports) found guilty, and was executed by the sword.

Notable features, in the Biblical account, for Roman procedure, are the statements of Festus that the accused is entitled to be confronted with his accusers, and that the specific charges must be formulated in sending him to Rome for trial:]

Then Paul took the men, and the next day purifying himself with them went into the temple, declaring the fulfilment of the days of purification, until the offering was offered for every one of them.

1. From "Acts of the Apostles", Chaps. XXI-XXVII, Oxford Revised Version, Oxford, University Press, 1881.

And when the seven days were almost completed, the Jews from Asia, when they saw him in the temple, stirred up all the multitude, and laid hands on him, crying out, "Men of Israel, help! This is the man that teacheth all men everywhere against the people, and the law, and this place: and moreover he brought Greeks also into the temple, and hath defiled this holy place." . . . Then the chief captain came near, and laid hold on him, and commanded him to be bound with two chains; and inquired who he was, and what he had done. . . . But Paul said, "I am a Jew, of Tarsus in Cilicia, a citizen of no mean city: and I beseech thee, give me leave to speak unto the people." . . .

The chief captain commanded him to be brought into the castle, bidding that he should be examined by scourging, that he might know for what cause they so shouted against him. And when they had tied him up with the thongs, Paul said unto the centurion that stood by, "Is it lawful for you to scourge a man that is a Roman, and uncondemned?" And when the centurion heard it, he went to the chief captain, and told him, saying, "What art thou about to do? for this man is a Roman." And the chief captain came, and said unto him, "Tell me, art thou a Roman?" And he said, "Yea." And the chief captain answered, "With a great sum obtained I this citizenship." And Paul said, "But I am a Roman born." They then which were about to examine him straightway departed from him: and the chief captain also was afraid, when he knew that he was a Roman, and because he had bound him.

But on the morrow, desiring to know the certainty wherefore he was accused of the Jews, he loosed him, and commanded the chief priests and all the council to come together, and brought Paul down and set him before them. . . . When Paul perceived that the one part were Sadducees, and the other Pharisees, he cried out in the council, "Brethren, I am a Pharisee, a son of Pharisees; touching the hope and resurrection of the dead I am called in question." And when he had so said, there arose a dissension between the Pharisees and Sadducees, and the assembly was divided. For the Sadducees say that there is no resurrection, neither angel, nor spirit: but the Pharisees confess both. And there arose a great clamour;



and some of the scribes of the Pharisees' part stood up, and strove, saying, "We find no evil in this man: and what if a spirit hath spoken to him, or an angel?"

And when there arose a great dissension, the chief captain, fearing lest Paul should be torn in pieces by them, commanded the soldiers to go down and take him by force from among them, and bring him into the castle. . . . And he called unto him two of the centurions, and said, "Make ready two hundred soldiers to go as far as Caesarea, and horsemen threescore and ten, and spearmen two hundred, at the third hour of the night;" and he bade them provide beasts, that they might set Paul thereon, and bring him safe unto Felix the governor. And he wrote a letter after this form: "Claudius Lysias unto the most excellent governor Felix, greeting. This man was seized by the Jews, and was about to be slain of them, when I came upon them with the soldiers, and rescued him, having learned that he was a Roman. And desiring to know the cause wherefore they accused him, I brought him down unto their council; whom I found to be accused about questions of their law, but to have nothing laid to his charge worthy of death or of bonds. And when it was shewn to me that there would be a plot against the man, I sent him to thee forthwith, charging his accusers also to speak against him before thee."

So the soldiers, as it was commanded them, took Paul, and brought him by night to Antipatris. But on the morrow they left the horsemen to go with him, and returned to the castle: and they, when they came to Caesarea, and delivered the letter to the governor, presented Paul also before him. And when he had read it, he asked of what province he was; and when he understood that he was of Cilicia, "I will hear thy cause," said he, "when thine accusers also are come"; and he commanded him to be kept in Herod's palace.

And after five days the high priest Ananias came down with certain elders, and with an orator, one Tertullus; and they informed the governor against Paul. And when he was called, Tertullus began to accuse him, saying, "Seeing that by thee we enjoy much peace, and that by thy providence evils are corrected for this na-

tion, we accept it in all ways and in all places, most excellent Felix, with all thankfulness. But, that I be not further tedious unto thee, I intreat thee to hear us of thy clemency a few words. For we have found this man a pestilent fellow, and a mover of insurrections among all the Jews throughout the world, and a ringleader of the sect of the Nazarenes; who moreover assayed to profane the temple; on whom also we laid hold; from whom thou wilt be able, by examining him thyself, to take knowledge of all these things whereof we accuse him". And the Jews also joined in the charge, affirming that these things were so.

And when the governor had beckoned unto him to speak, Paul answered,

"Forasmuch as I know that thou hast been of many years a judge unto this nation, I do cheerfully make my defence; seeing that thou canst take knowledge that it is not more than twelve days since I went up to worship at Jerusalem: and neither in the temple did they find me disputing with any man or stirring up a crowd, nor in the synagogues, nor in the city. Neither can they prove to thee the things whereof they now accuse me. . . . Now after many years I came to bring alms to my nation, and offerings: amidst which they found me purified in the temple, with no crowd nor yet with tumult. But there were certain Jews from Asia, who ought to have been here before thee, and to make accusation, if they had aught against me. Or else let these men themselves say what wrong-doing they found, when I stood before the council, except it be for this one voice, that I cried standing among them, Touching the resurrection of the dead I am called in question before you this day."

But Felix, having more exact knowledge concerning the Way [of Jesus], deferred them, saying, "When Lysias the chief captain shall come down, I will determine your matter." And he gave order to the centurion that he [Paul] should be kept in charge, and should have indulgence; and not to forbid any of his friends to minister unto him.

But after certain days, Felix came with Drusilla, his wife, which was a Jewess, and sent for Paul, and heard him concerning the faith in Christ Jesus. And as he reasoned of righteousness, and temper-

ance, and the judgement to come, Felix was terrified, and answered, "Go thy way for this time; and when I have a convenient season, I will call thee unto me." He hoped withal that money would be given him of Paul; wherefore also he sent for him the oftener, and communed with him. But when two years were fulfilled, Felix was succeeded by Porcius Festus; and desiring to gain favour with the Jews, Felix left Paul in bonds.

Festus therefore, having come into the province, after three days went up to Jerusalem from Caesarea. . . .

And when he had tarried among them not more than eight or ten days, he went down unto Caesarea; and on the morrow he sat on the judgement-seat, and commanded Paul to be brought. And when he was come, the Jews which had come down from Jerusalem stood round about him, bringing against him many and grievous charges, which they could not prove; while Paul said in his defence, "Neither against the law of the Jews, nor against the temple, nor against Caesar, have I sinned at all." But Festus, desiring to gain favour with the Jews, answered Paul, and said, "Wilt thou go up to Jerusalem, and there be judged of these things before me?" But Paul said, "I am standing before Caesar's judgement-seat, where I ought to be judged; to the Jews have I done no wrong, as thou also very well knowest. If then I am a wrongdoer, and have committed any thing worthy of death, I refuse not to die; but if none of those things is true, whereof these accuse me, no man can give me up unto them. I appeal unto Caesar." Then Festus, when he had conferred with the council, answered, "Thou hast appealed unto Caesar: unto Caesar shalt thou go."

Now when certain days were passed, Agrippa the King and Bernice arrived at Caesarea, and saluted Festus. And as they tarried there many days, Festus laid Paul's case before the King, saying, "There is a certain man left a prisoner by Felix; about whom, when I was at Jerusalem, the chief priests and the elders of the Jews informed me, asking for sentence against him. To whom I answered, that it is not the custom of the Romans to give up any man, before that the accused have the accusers face to face, and have had opportunity to make his defence concerning the matter laid against him. When therefore they were come together here, I

made no delay, but on the next day sat down on the judgement-seat, and commanded the man to be brought. Concerning whom, when the accusers stood up, they brought no charge of such evil things as I supposed; but had certain questions against him of their own religion, and of one Jesus, who was dead, whom Paul affirmed to be alive. And I, being perplexed how to inquire concerning these things, asked whether he would go to Jerusalem, and there be judged of these matters. But when Paul had appealed to be kept for the decision of the Emperor, I commanded him to be kept till I should send him to Caesar." And Agrippa said unto Festus, "I also could wish to hear the man myself." "Tomorrow," saith he, "thou shalt hear him."

So on the morrow, when Agrippa was come, and Bernice, with great pomp, and they were entered into the place of hearing, with the chief captains and the principal men of the city, at the command of Festus Paul was brought in. And Festus saith, "King Agrippa, and all men which are here present with us, ye behold this man, about whom all the multitude of the Jews made suit to me, both at Jerusalem and here, crying that he ought not to live any longer. But I found that he had committed nothing worthy of death; and as he himself appealed to the Emperor I determined to send him. Of whom I have no certain thing to write unto my lord. Wherefore I have brought him forth before you, and specially before thee, King Agrippa, that, after examination had, I may have somewhat to write. For it seemeth to me unreasonable, in sending a prisoner, not withal to signify the charges against him."

And Agrippa said unto Paul, "Thou art permitted to speak for thyself." Then Paul stretched forth his hand, and made his defence:

"I think myself happy, King Agrippa, that I am to make my defence before thee this day touching all the things whereof I am accused by the Jews: especially because thou art expert in all customs and questions which are among the Jews; wherefore I beseech thee to hear me patiently. My manner of life then from my youth up, which was from the beginning among mine own nation, and at Jerusalem, know all the Jews; having knowledge of me from the first, if they be willing to testify, how that after the straitest sect

of our religion I lived a Pharisee. . . . Whereupon as I journeyed to Damascus with the authority and commission of the chief priests, at midday, O King, I saw on the way a light from heaven, above the brightness of the sun, shining round about me and them that journeyed with me. And when we were all fallen to the earth, I heard a voice saying unto me in the Hebrew language, 'Saul, Saul, why persecutest thou me? It is hard for thee to kick against the goad.' And I said, 'Who art thou, Lord?' And the Lord said, 'I am Jesus whom thou persecutest. But arise, and stand upon thy feet: for to this end have I appeared unto thee, to appoint thee a minister and a witness both of the things wherein thou hast seen me, and of the things wherein I will appear unto thee.' . . . Wherefore, O King Agrippa, I was not disobedient unto the heavenly vision: but declared both to them of Damascus first, and at Jerusalem, and throughout all the country of Judaea, and also to the Gentiles, that they should repent and turn to God, doing works worthy of repentance. . . . Having therefore obtained the help that is from God, I stand unto this day testifying both to small and great, saying nothing but what the prophets and Moses did say should come." . . .

And as he thus made his defence, Festus saith with a loud voice, "Paul, thou art mad; thy much learning doth turn thee to madness." But Paul saith, "I am not mad, most excellent Festus, but speak forth words of truth and soberness." . . . And Agrippa said unto Paul, "With but little persuasion thou wouldest fain make me a Christian." And Paul said, "I would to God, that whether with little or with much, not thou only, but also all that hear me this day, might become such as I am, except these bonds."

And the King rose up, and the Governor, and Bernice, and they that sat with them: and when they had withdrawn, they spake one to another, saying, "This man doeth nothing worthy of death or of bonds". And Agrippa said unto Festus, "This man might have been set at liberty, if he had not appealed unto Caesar".

And when it was determined that we should sail for Italy, they delivered Paul and certain other prisoners to a centurion named Julius, of the Augustan band.

## EPILOGUE

### *Chapter 31*

## *EVOLUTION OF THE TRIAL-METHODS, AND THEIR POLICY.*

## Chapter 31

### *Introductory*

- I. *The Community*
- II. *The Ruler, or Power-holder*
- III. *The Tribunal*
- IV. *The Accuser*
- V. *The Charge or Complaint*
- VI. *The Arrest and Detention*
- VII. *The Accused's Helpers*
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- X. *The Judgment*
- XI. *The Evolution of "Justice" as a Motive for Controlling Trial-Procedure*

## EPILOGUE: EVOLUTION OF THE TRIAL-METHODS, AND THEIR POLICY.<sup>1</sup>

**Introductory.** Let us now see whether the scattered instances here collected may have a meaning for us in two aspects,—first, hints of the process of the past *evolution* of the various elements in trial-procedure, and secondly, lessons of sound *policy* in the modern control of trial procedure.

In the first aspect, we ask whether these instances indicate anything for the forms and the causes of change in the successive stages of procedural invention, as the communities progress from primitive social life to advanced social life, and whether any of those forms and causes were common features in some or all communities.

In the second aspect, we ask whether the operation of any of those varied trial-styles, judged by our present-day standards of just and efficient control, impress us as unjust or inefficient in any particular,—or, in other words, whether they have in some particular a lesson or warning for the control of our present methods.

Having these two aspects in mind, then, it is first necessary to analyze the separate elements of trial-procedure; for both in evolution and in policy the differences in observed trial-styles in different places and times may lie peculiarly in some particular one or more only of these elements.

This analysis seems to resolve as follows:

- I. The community;
- II. The ruler, or power-holder;
- III. The tribunal;
- IV. The accuser;

1. A few of the illustrative examples herein referred to are based on materials given in the author's "Panorama of the World's Legal Systems".

- V. The charge;
- VI. The arrest and detention;
- VII. The accused's helpers;
- VIII. The proof;
- IX. The deliberations;
- X. The judgment;
- XI. The Evolution of "Justice," as a motive for Controlling Trial-Procedure.

In tracing the evolution of each of these elements, there must of course be some resort to inference or hypothesis to fill in the gaps. A descriptive survey of any phase of human conduct which, like the present one, ranges world-wide in time and in space, is likely always to suggest general truths. But any generalizations that could profess to be attained truths would have to be based on comprehensive collections of data; and such data are of vast scope and bulk, never yet collected and analyzed. The examples here offered are obviously not complete, nor perhaps always typical. But they were certainly actual. They did occur. They are therefore at least suggestive of what did in fact satisfy at the time some portion of the community in its quest for a way of getting or doing justice. May they not therefore be looked upon as suggestions of positive tendencies, either regular or occasional? And from these clues may not hypotheses be built up which will some day serve for discussion, when comprehensive collection of data shall come to be studied from the present point of view?

#### And first, I. The Community

A. *Evolution.* From the evolutionary point of view, everything naturally depends upon the stage of progress (so-called) of the community in which the trial is held. In the most primitive forms of society (represented by the retarded extant peoples, like the Kwakiutl of North America (chap. 20), there is little or no attempt at a trial-procedure. The tribe, as a whole, immediately gathers and prepares to pursue the alleged wrongdoer and to wreak tribal vengeance upon him. The only event that can stop this is the offender's tender of value-satisfaction, whatever that is deemed to be; and no definite procedure is at that stage provided for this.

But as higher stages of social organization are reached, though no true trial-form may intervene, there do arise definite forms for making and accepting this satisfaction, as with the Hurons (chap. 20) and the Papuans (chap. 26).

In the still higher organizations, there arises some intervening process of the formation of a tribunal, perhaps a hearing, and the formal pronouncement of a judgment, as with the Pah-Utes, the Algonkins, the Sioux (chap. 20), the Nabaloi and the Ifugao (chap. 25), the Kikuyu, the Amaxosa, and other African tribes (chap. 17). From this social stage, on upwards, this intervening element of a trial, in the ordinary sense, becomes more prominent and more elaborate.

So the suggestion emerges that the stage of a community's social development can almost clearly be identified by the extent to which its custom recognizes that a procedure of inquiry or negotiation or trial of some sort must intervene. A principal cause of this feature (as will be seen below) is the community's awakened consciousness that the impulse for vengeance will lead to self-destruction if not socially self-controlled for a while. The motive to satisfy a sense of "justice" can hardly be supposed to enter yet at this stage.

B. *Policy.* Primitive impulses remain alive and strong, in a degree, among some groups of even the modern community. Hence the uncontrolled impulse to lynch that is found in some places. Sometimes there is the excuse that ordinary courts are not available. But sometimes even with that excuse, a revenge takes place with no attempt to hold at least an informal trial.

(a) A lesson for modern times from evolution is that the self-control of the community, which insists upon a trial (of facts and merits) in the full sense, should be regarded as a mark of the advanced stages of civilization; and that the lack of such a self-control should be stigmatized as a mark of the survival of the most primitive dangerous instincts.

(b) Another and obvious lesson is that the machinery of a trial should be safeguarded in every way from the oppressive influence

of current popular emotion wherever such emotion is likely to exist. The usual provisions of law for change of venue and for careful selection of jurors and judges are instances of this. But there is still needed a further precaution in the management of the court-room by limiting public access; examples of the sinister effects of a lack of such control are the witchcraft trials in Massachusetts, the French Revolutionary trials; and in modern America the Frank trial in Georgia (1913) and the Hauptmann trial in New Jersey (1935), where the populace massed in the court-room were allowed to influence the jurors with sinister expressions of scorn and prejudice against the accused.

## II. The Ruler, or Power-Holder

A. *Evolution.* The general governmental power in the community may be in the hands (broadly speaking) of an autocrat, a limited monarch, an oligarchy, or a democracy. What is the difference, if any, in the influence of these four methods on trial procedure?

Some suggestions seem indicated:

In an autocracy, much depends on the ruler's personality. A ruler whose character disposes him to devote conscientious thought and effort to administering justice will see to it that the trial-system is adequate; otherwise not. This is well illustrated in India, for the testimonies of observers as to the trial-systems in India vary widely for different periods and places, and this seems explainable only by the different rulers' personalities.

In a limited monarchy, the ruler's personality has comparatively less of direct influence. But here the influence of some chief official is what counts; as illustrated by Colbert in France, Speranski in Russia, and some of the older judges in England. The trials here given of King Frederick of Prussia and Tsar Peter in Russia, and the influence of Haroun Al Rashid in Bagdad, of Suleiman in Turkey, of Justinian in Constantinople, also illustrate the contrast between autocracy and limited monarchy. The progress in trial method from democracy to autocracy is illustrated by the measures of Augustus in Rome.

For oligarchies, there are few available examples. That of Venice (chap. 5) suggests the possibility that an oligarchy's constant necessity of preserving the power of the ruling faction may lead to the discomenancing in the trial system of those features which make for better protection of the accused, as in England in the period 1500-1600. Yet in the Amerindian Sioux tribe (chap. 20) and other primitive peoples, the power of an oligarchy of elders seems to have been useful for control of the multitude.

A democracy, if we may draw inferences from early Greece and republican Rome, takes little care to develop the trial system beyond a certain point. Yet in some of the African tribes (chap. 17), where the popular vote seems to rule, the trial-system has sometimes reached elaborate development. The high development of the English trial system took place under limited monarchs, yet only with painful slowness; and its final stages were attained only by expressions of popular demand at periods of virtually democratic government.

B. *Policy.* If there is indeed an evolutionary tendency in democracies not to care to improve the trial system except at long intervals, it behooves us, as a matter of sound policy, to make and keep the trial system a subject of prominent and careful attention, with a view to adapting it to other progressive changes in communal life. At present the United States is in a period of such attention. But that period was preceded by a century of careless inattention. Hereafter the attention should be constant and unceasing.

## III. The Tribunal

By "tribunal" is here meant the individual or the group to whom the proof is addressed and by whom the judgment is given.

A. *Evolution.* In the advanced stages of a community, the tribunal is usually found to be an individual ruler or a person or group deputed by him to act in his place. But what is found in the early stages?

(1) In the Greco-Latin communities and the Germanic communities it seems clear that originally the *whole tribal group* formed

the tribunal. Its jurisdiction, to be sure, did not apply to disputes within the family or family-clan; here the head of the family dispensed all domestic justice without external control. But for disputes between families or clans or members of different families or clans the tribe at large acted as the tribunal. This is seen also in some of the Amerindian and some of the African and Polynesian tribes.

In a next advanced stage, the elders almost always appear as guides to the popular judgment. The elders propose one or more judgments, the adult populace thereupon chooses and approves or disapproves.

(2) But was this popular tribunal the primitive stage in all regions?

Two other types of tribunal are found, at the period when the community first emerges into history,—the regal and the sacerdotal type.

The *regal* type is found in several Oriental stocks (India, chap. 11) and in one African stock (chap. 17). The ruler is an individual despot, and all administration of justice emanates from him, either directly or indirectly. But was this the case from the beginning in those communities? Was the hereditary despot over millions once only the temporary chieftain over hundreds? Looking at the subservience of their populace in historic and modern times, it would seem probable that in some instances the attitude to power had there been always so; and that the temperament of some race-stocks has from the beginning allowed the trial procedure to be vested in and be developed by the ruler alone.—And yet the instance of the ancient village "got sabha" courts in India (chap. 12) seems to contradict this hypothesis.

The *sacerdotal* type is found in early Egypt, Babylonia, and Judaea (chaps. 26–28) and in some modern African tribes (chap. 17). Where the hold of religion and the supernatural on the community has been intense and pervasive, its members have submitted to the sacerdotal pronouncements in litigation as well as in agriculture, hunting, and other departments of life. In some race-stocks, as the Celts and the Hindus, the priestly caste (Druids, Brah-

mans) appear nominally as advisers only to the ruler, but their advice is practically controlling. Whether in those communities this relation represents a diminution of their own original status, or an encroachment upon the ruler's original status, cannot be told; but the former sequence is the probable one.

These two special types—the regal and the sacerdotal—are found persisting in some advanced communities. But they are also found in many modern communities having the marks of retarded primitiveness, as in Africa (chap. 17). Hence, it seems plausible to infer that in the evolution of a trial-procedure there have been two grand opposite types,—one, in which the community has from the beginning allowed the ruler or the priest to be the tribunal; the other, in which the adult populace has from the beginning acted as the tribunal, gradually, of course, yielding up (as in Rome and the Germanic stock) its status to the ruler or his deputies or to elders, wholly or in part.

One noticeable feature here is that where the community has thus for a long period given up democratic judiciary power, it is slow to accept any change in the other direction. In England the popular jury has been toughly and obstinately preserved through nearly ten centuries,—an evolutionary relic of the Germanic popular voting-tribunal. But when on the Continent the Code Napoleon adopted the jury-system, and it was thus foisted upon all the European monarchies west of Russia, as an improved method, the new feature took root only feebly. As practised at the end of a century of adoption, it is far from being the English jury. Judge Gorphe has pointed out in his study of the Continental jury in the *Journal of Criminal Law and Criminology*, 1936, vol. XXVII, pp. 17, 155, 473, that in nearly every Continental Country the true jury tribunal has been modified into a tribunal of permanent official assessors.

(3) In the earliest stages, the tribunal, whether popular or autocratic, makes its decision *unaided*, i. e. the assembly or the chief reaches the decision by its own mental operations, without formal aid or advice of other persons.

But in a next marked stage the tribunal asks the advice of persons who have the avowed status of legal advisers. This stage seems to have been passed through in almost every people's history.

The motive for such a functionary seems to have had three aspects,—first, the restraining advice of the elders, whose experience inclines them to a decision which will prevent the injury of the group by destructive feuds; secondly, in the earlier communities, where respect is profound for the gods' influence upon daily life, the resort to priests (magicians, witch-doctors, etc.) as those who would best know what would please the gods or avert their disfavor; thirdly, in a stage when fixed popular custom still rules all social conduct, the resort to those persons who by their age and special experience are well familiar with these traditions and the customs.

In the various communities each one of these aspects is seen more or less dominant:

(1) In the Amerindian tribes, where the blood-feud continued throughout to be the most natural sequence to a killing, the elders have a strong status, sometimes a decisive one. No particular elders appear usually to have been selected; we read of the elders in general being the leaders in the decision.

(b) In the communities controlled by religion or superstition, and of course those in which a highly organized priesthood has developed, the priests are these advisers. In a later stage of these communities the priests sometimes come to be the sole deciders,—as with the Egyptians, the Babylonians (before the Hammurabi period), and the Hebrews. In others, where that development never took place, the priests sit with the ruler and advise him,—as the Druids advised the Celtic kings and the Brahmans advised the rajahs.

(c) In still other communities, these advisers are a class of secular persons who have made a specialty of acquaintance with the traditions,—as with the Law-Speakers among the Germanics, the Augurs and the Jurisprudents in early Rome, and the Elders in Homer's description of the Greek popular tribunal. The intellectu-

al, rationalized Greeks of the Athenian period no longer knew these advising elders. In the Arabian Mohammedan system, the Muftis had early obtained the status of advisers of the Kadi; their development was peculiar; for originally they were looked upon as the interpreters of Mohammed's divinely inspired words and conduct, though in no sense did they form a priesthood; but later their status and mental operations became purely secular.

This resort to special advisers is found, as noted above, in communities not only where the tribunal is a popular or tribal one but also where it is the individual autocrat himself. This is because the above three reasons—one or another—are equally applicable to either form of governance. How inveterate is the inclination of rulers to resort to such advisers is seen in the continued use of them under the Romanesque development in Europe beginning with the revival of Roman learning in the 1100s. Their special status is seen in Shakespeare's *Merchant of Venice*, where the Duke calls in Portia to advise him (Portia being the young deputy of the jurisconsult Bellario); "I may dismiss this Court" says the Duke "unless Bellario, a learned doctor whom I have sent for to determine this, come here today". Such was the status of the Continental jurisconsult for seven centuries. As time goes on, he becomes merely the advocate. Yet even by the Portia period, he could still be fee'd and retained beforehand by the parties; so too in the saga period of the Germanics, and in the modern Mohammedan practice, each party could engage a jurisconsult to help him. Thus the transition from advising jurisconsult to partisan advocate comes about finally; but his status in the intermediate period seems to us anomalous.

(4) A peculiar development, occasionally found, is the use of *intermediaries* as advisers,—intermediaries, that is, chosen by consent of both parties. One form of this is seen in an African tribe (chap. 18), another in a Philippine tribe (chap. 26). In the African case the casual intermediary is termed (by the modern observer) a "witness", though this seems an anomalous word. In the Philippine case, he is by profession an intermediary. The genesis of this peculiar kind of adviser is not easy to determine.



**B. Policy.** Whether the professional individual tribunal or the popular group-tribunal is the better in policy for securing fair and effective trial procedure seems to depend on the period, the place, and the person. The opportunity of the single judge to use intuition and experience in reaching the mentality of parties and witnesses is shown, not only in the Oriental annals from Solomon down through Arabia and China and Japan, but also in the scientific use of the modern lie-detector for police purposes. On the other hand the mental limitations of the routine judge led many nations for centuries to rely upon torture as a means of securing a confession; and it does not appear that a popular tribunal ever made torture a part of its procedure for obtaining proof. What may be best in modern complex times may be very different from what was satisfactory for primitive small groups. The contrast of needs can be seen even in contemporary experience in the difference between metropolitan justice and "small-town" justice.

Certainly each of the contrasting methods has its advantages and its disadvantages. This is true enough even in a community of the same period and social constitution; witness the example of Col. Goethals' autocratic "Sunday Court" in the Panama Canal Zone (chap. 23) compared with the statistics for jury-trial in the Illinois Crime Survey of 1929, and the descriptions of ordinary (not political) criminal and civil justice under the modern Russian Tsarist regime and the Soviet Republic regime.

As between different nations having different traditions and temperaments, in normal times, perhaps the most that can be said on this point is what Sir James Stephen in his "History of the Criminal Law" said of the contrasting French and English systems, that each is the better for its own people and that the one would not suit the other people.

#### IV. The Accuser, and V, The Charge

The next questions in trial-procedure, are, Who is the accuser (or, complainant)? and, How is his charge (or, complaint) made?

Naturally, these elements will depend upon and develop with the nature of the tribunal. But the two questions must first be

answered for the most primitive period, before the later forms can be understood.

1. Now, as a starting-fact, it seems certain that all primitive redress for wrongs received was in the hands of the tribe (or clan or family). Justice within the family was done in crude informality by the head of the family. But the conduct which led to the development of justice, by calling ultimately for regulation, was the revenge-conduct between tribes,—the injured tribe against the injuring one. This is because in the strong instinctive emotional life of primitives the injury received, whether to life or to property, is injury to the tribe. In case of death of a member of the tribe, its defensive (and aggressive) strength is weakened. Hence, the urge for redress is felt as a tribal urge. And the liability for making redress falls, for the same reason, on the tribe whose member has done the injurious act.

Hence, all remedial or revengeful action emanates from tribe against tribe. The elementary procedural stage of redress therefore is communal warfare by the one tribe against the other. This fundamental fact seems to emerge from all records of behavior of the most retarded modern peoples.

Hence, also, all subsequent stages of developed procedure consist in some modification of this tribal, or clan, warfare. Ultimately the tribal procedure thus developed will become applicable to individual disputants only, as the community becomes more disposed to discriminate.

What, then, were the next stages, by which a limitation is put upon uncontrolled tribal or clan warfare?

2. At this point, one naturally calls to mind the hypotheses of the great pioneer in this field, Sir Henry Maine, in his two chapters on "The Primitive Forms of Legal Remedies" (in "Early History of Institutions", Lectures IX and X).

But his hypotheses somehow do not wholly commend themselves, in the light of the elemental starting fact of tribal or clan warfare. His several hypotheses seem unpractical and inconsistent.

(1) The first is that two armed men are quarreling, the praetor "happens to be going by", "he interposes to stop the contest", they "agree that he shall arbitrate between them", and they agree "to pay a sum of money to the umpire" for his trouble. But is it not obvious, psychologically, that no savage warfare never did end in just that joint voluntary way?

(2) His second hypothesis is that the disputants wagered a sum of money "on the merits of their quarrel", and the stake "went into the public exchequer". But is not this also wholly advanced in time beyond the most primitive stage?

(3) A third hypothesis, variant from the preceding, is that the stake "went in the end to the successful litigant". Here, too, this solution seems far removed from primitive times, as well as from human nature at any time. In the Homeric example (chap. 29) and the Bedouin example (chap. 9) the "stake" went as the fee of the successful adviser.

(4) A fourth hypothesis is that the complainant "takes forcible possession of the adversary's movable property and detains it till he too submits" to arbitration,—that is, *if* the complainant is the stronger! What happens if he is not the stronger is not explained by this hypothesis. However, we do here come to an explanation which consorts with human nature. And the tribal or clan raid upon the offending clan's property may well be assumed to be the genesis of a procedure which had its own special details of later development in all race-stocks.

But though we may no longer accept Sir Henry Maine's hypotheses as explaining adequately the detailed stages of progress from the most primitive stage of unrestrained tribal or clan warfare, we may well accept his generalization as to the constant gradual process, viz., that "contention in court takes the place of contention in arms, but only gradually takes its place". The question remains as to the intervening detailed stages.

These stages will of course begin to vary widely in details as we reach communities having a strong executive power over a large population or group of clans, whether that central power be a chief

of a large modern retarded tribe or a "king" in one of the earlier advanced peoples like Egypt, Persia, India, and a Germanic people under Alfred or Charlemagne.

But must we not believe that there was in every such people an intervening stage when the tribe *as a whole* had the power and devised a modified system of controlling revenge or raids?

That such was the case seems to be inferable from various examples in the surviving retarded peoples of modern times in Africa, America, and Oceania. In the Hurons, for example (chap. 20) the tribe of the offender required the offender's family to offer ample redress in goods, but even punished the offended family in the same way if it pursued the feud without accepting redress. In other peoples (chap. 17) the tribe allows the offended family to surround the offender's village, to compel him to yield, but without actually attacking him. In others (chap. 25) the tribal opinion virtually forces the offender's family to resort to an arbiter or an agent as preliminary to negotiation for redress. In still another (chap. 25) the tribe itself descends upon the offender's family and destroys or confiscates a sufficient amount of property, if redress has not been voluntarily offered. In another, it is the wrongdoer who goes and sits in humiliation before the injured man's dwelling, silently proposing redress (chap. 17). And in still another (chap. 25) the *injured* family offers a feast to the tribe, as an overture to friendship!

All of these recorded primitive practices are in realistic contrast to the Maine typical hypothesis of two men quarreling but stopping when the praetor approaches and *both asking* him to act as arbitrator! And in all of them, there is as yet no praetor and no court in the strict sense, and no ruler offering or insisting upon his justice as a substitute for direct personal revenge or raid. The procedure is democratically tribal in a stage prior to kingship.

Enough has now been said to indicate the hypothesis here offered, viz. that the gradual invention of procedures to allay unrestrained revenge or raid did not first appear in the periods of king or praetor, but can be found starting in the intervening political stage of tribal control, when the whole tribe (led or advised,

to be sure, by elders, no doubt) took the responsibility of preserving its tribal strength by restraining the urge of injured families to retaliatory feuds which might be endless.

To prove such an hypothesis would of course for its proof take a wide range of detailed analysis. But at least it is worth offering in contrast to some of Sir Henry Maine's pioneer proposals.

## VI. The Arrest and Detention

A. *Evolution.* May it not be inferred that, so long as the process of redress was based on family or clan liability, there could be no element of arrest and detention within that process? The injured clan had made up its mind on information acquired by its own efforts, and was ready to seek redress; but it could not arrest and detain the offending clan, first, because no question of giving them a hearing would arise, and secondly, because the violence involved in an arrest of the whole offending-clan would virtually result in an interclan warfare, which the injured clan is (by hypothesis) wishful to avoid.

However, if an individual member of the offending clan should happen to be captured when straying from home, he could be detained as a hostage. The detention of such a hostage (as found in some tribes) would therefore be the beginning of a precedent for arrest and detention of the accused, when the stage of development arrived in which the individual, and not his whole clan, becomes the object of liability.

When that later stage does arrive, the lack of prisons is no obstacle to a process of virtual arrest and detention, for two reasons:

(1) One reason was that an escape, except to become a homeless outlaw, was in primitive life usually impracticable. Yet, in one African tribe (chap. 28) an accused could find refuge by transferring his home to another village-clan. And in other primitive communities, the city of refuge or the religious shrine, offered safety, though only temporarily.

(2) A second reason why the lack of detention-prisons was no obstacle in the early tribal period, was that if the individual wrongdoer should elude himself the injured tribe could take redress up-

on the person or property of one of the culprit's kindred (as illustrated in the Pahlavi and Choctaw tribes, chap. 20).

The recognition (when it comes) of an interval of arrest and detention, instead of the prompt execution of the killer or the raid upon property, marks a definite stage of progress in that community towards a rational determination of the merits of the case by allowing a hearing and proofs. From this stage onwards begins the development of an interlocutory trial procedure in the modern sense.

B. *Policy.* One obvious difference between the primitive stages and the advanced stages is the difference of promptness in doing justice. Every step taken towards a careful rational determination of the merits of the charge, by trial procedure, signifies decrease of speed and lengthening of the interval between the wrongful act and its final redress. Thus, as so-called civilization advances, the complaint is everywhere heard that justice is slow. An example, almost amusing in its details, is the story of Richard de Anesty's five-year quest for justice in the early days of Anglo-Norman justice (chap. 2).

The moral is that the advanced civilizations should be constantly on the guard to check this vice, inherent in the fundamental objective of using rational and thorough methods in trial-procedure.

## VII. The Accused's Helpers

A. *Evolution.* In this stage, when the propriety has come to be recognized of allowing to the accused an opportunity to make his defence, one of the first questions that arises is, How far may the accused be allowed assistance in making that defence?

Here the various communities seem to show a divergence into two opposite principles. Obviously, the accused persons are of varied abilities to tell their own story and to find and produce their witnesses. In one type of community, there is therefore allowed to develop a professional class of helpers,—in the Germanic and Graeco-Latin peoples, the "vorsprecher", for-speaker, advocate, and under various names in some of the retarded modern tribes. In another type, chiefly the autocratic ones, it is commonly reported

that "no lawyers are allowed", i. e. no professional advocates. But on examination behind the scenes (as it were) it frequently becomes certain that this appearance does not represent the facts. For an accused who is incapable because of illness or the like, and finally for every accused, a relative of the accused is allowed to speak for him, or even a friend or perhaps a dependant (a bailiff or the like, in the case of an accused of high degree). In medieval Japan and China this practice is on record; in classical Greece, its later stages have been reached, where the professional advocate writes a speech which the party delivers. Frequently, we may infer, the purporting relationship became a mere pretext, which the authorities did not attempt to puncture. Thus, finally, comes the open license to be assisted by professional advocates.

B. *Policy*. But here too, as in the preceding Topic, with the development of a rational and thorough trial procedure comes complexity, and with complexity comes the plight of the accused who now not only may but must employ a professional helper. "The man who is his own lawyer has a fool for his client". This maxim represents a reproach to the civilized system of trials. That system has now constantly to guard itself against the very defect of its objective by reason of the indispensability of professional helpers. Hence, the modern tendency to re-establish special courts for small causes and conciliation courts, arbitration without lawyers, and so on. Such is the lesson from evolution.

### VIII. The Proof

A. *Evolution*. In those retarded primitive tribes of modern times which are found fully recognizing the propriety of a hearing and the receipt of evidence, there appear, in respect to proof, two features, coincident but distinct.

(1) One feature is the listening without rules of limitation to all that the parties may say and produce by way of proof. The remarkable extent to which this process was developed is seen in some of the modern African tribes (chap. 18). In one tribe, we are told, the process may last for days at a time. In these cases, the tribunal does the best it can, without rules of guidance, to reach a decision of its own after listening to the entire "palaver".

Ultimately, however, certain rules are sometimes developed for estimating the force of the proofs. This took place in India, in Rome, in Mohammedan law, and in the advanced European stages.

(2) The other feature consists in referring the proof to divine power, i. e. to an "ordeal". This feature would seem to have been used by every community at some stage.

It existed alongside of the other feature, but of course there had to be rules for a choice between the two methods of proof. And here there developed some marked contrasts.

In one type of community (e. g. the Bedouin Arabs, chap. 10, and the Hindus, chap. 12), the ordeal is resorted to only if there is *no other* material evidence which the tribunal considers sufficient for guilt. Thus the ordeal is for the accused a benefit, in the sense that by demanding the ordeal and succeeding under it, he escapes the risk of being harassed by the injured family's vendetta.

In another type of community (i. e. the Germanics, chap. 4), the ordeal is resorted to only *if there is* material evidence tending to the accused's guilt. In this aspect also, the ordeal is a benefit to the accused, but in a different way; for it gives him a chance to escape condemnation by the tribunal on the complainant's *prima facie* evidence (e. g. possession of stolen goods, or oaths of the complainant's compurgators).

The modes of ordeal were almost endless. Their variety can best be seen in the customs of the modern retarded primitive tribes (e. g. Philippine tribes, chap. 26). All of them derive from the special religious belief of the particular community. And some variety of them remains in nearly every people of the world except those under the modern Romanesque and Anglo-American legal systems. Even in the latter peoples, the virtue of the ordeal, though no longer officially recognized, is often accepted in the popular superstitious cult of certain classes.

B. *Policy*. The disappearance of the ordeals was due to the development of rationalism and the perceived inefficiency of ordeals. The simple moral is that any system of proof should be consciously reformed when it has become obviously inefficient. This

was what took place in Continental Europe under the influence of the Napoleonic Code. It should also be undertaken for the Anglo-American system.

### IX. The Deliberations

A. *Evolution.* Shall the decision be immediate, or shall time be taken for fuller deliberation?

The primitive solution, of course, is the former one, because of the impulse of uncontrolled emotions (as in the Mano tribe, chap. 17). As the community becomes more rational, the wisdom of delay becomes more apparent,—delay between the arrest and the trial, and delay after the hearing. Appeals to a second tribunal are the final phase of the wisdom of delay. One of the African tribes (chap. 17) here shows a remarkably advanced stage.

But this element is one of the slowest in development. The consciousness of the tribunal that there can be a mistake, and that a later consideration may be a wiser one, has to struggle against the pressure by the injured party for prompt redress. In England, as late as the 1700s, some important criminal trials were disposed of within only a week between perpetration and execution; and the appeal as of course in criminal cases did not come into the law until the end of the 1800s.

B. *Policy.* But the wisdom of an appropriate delay in deliberation, like every other great principle, brings its own shortcomings when made a fetish. In the United States today the excesses of delay, both in civil and criminal trials, now call for a reaction towards the promptness of earlier times.

### X. The Judgment

A. *Evolution.* The judgment and the penalty or compensation are of course distinct elements. But the penalty is no part of the trial-procedure; it is a part of the substantive penal law,—a different field, of vast scope, but not here concerned.

The judgment, regarded an element in trial procedure, may be public or private, oral or written, unreasoned or reasoned.

1. In earliest periods, the popular assembly is of course *open* and *public*, and its judgment is openly pronounced. This continues to be so—inevitably, it would seem—as long as the tribunal continues to be a popular one.

But where the oligarchic or autocratic type of rule develops, there is a natural tendency for a secret judgment to be used. The ruler of a turbulent people, especially if he represents a faction or clan, cannot afford to have his judgment submitted to popular scrutiny and dissent. This innate tendency lasting into modern times is seen in Napoleon's secret condemnation of the Duc d'Enghien,—a notorious case in its day, not so long ago, and in the tales of the prisoners of the Bastille, sent there under a royal secret "*lettre de cachet*". The constant possibility of such a terroristic practice under an autocracy is seen in the popular esteem and devotion accorded to rulers who have vouchsafed to hold court and render judgment openly—like Louis IX (Saint Louis) sitting under a tree in his garden (chap. 3), the modern Imam of the Yaman doing likewise (chap. 10), and at Bagdad the Caliph Haroun al Rashid, surnamed the Just.

2. In the earliest primitive stages, the judgment is of course *oral*.

But as the art of writing develops, the tendency is to record the judgment. Egypt and Babylon had already reached this stage at the period when the first extant records of their general life are found. In China, oddly enough, this tendency never developed till later times; there is ample recorded reference to laws and justice long before Confucius (B.C. 600), but no records of particular judgments.

The tendency has varied with different tribal stocks. In the Germanic tribes, for example, all of them coming into the use of writing after say A.D. 500, and all of them exposed to adjacent Roman Latin influences, the Continental Germanics take a long time to develop the written judgment; the earliest extant do not precede A. D. 1400; while the Anglo-Normans have such records going back to the 1100s, and their later records are more regular and copious

than in any Continental group outside of Italy and southern France (where Roman tradition controlled).

The practice of written records, it need hardly be observed, leads to the formation and observation of precedents, and thus to the formulation of settled principles. The early development of written judicial records in Anglo-Norman England was the reason why its law became in form dominantly a body of precedents; while on the Continent a code became the more natural form.

3. In the earliest stage of justice-procedure, the judgment as pronounced is of course a concise *unreasoned* one. The popular tribunal cries, "Acquit him!" or "Away with him to the stake!" The autocratic chief, as in the case of the South American cannibal tribe, where the parties disputed the title to a slain hog (chap. 25), says, "The hog is mine. Go!"

But in later stages the judgment comes gradually to be a reasoned one, i.e. the advisers of the tribunal expound the custom by which the case should be decided,—not only in the popular tribunals, as did the Elders in the Homeric lawsuit (chap. 29) and the Law Speakers in the Germanic lawsuit (chap. 7), but also in the autocratic tribunals, as did the Brahmans in the rajah's court (chap. 12) and the Brehons in the Celtic chieftain's court.

Now it might have been presumed that the reasoned judgment would not have developed until after the recording-stage of the judgment had arrived. But the historic fact is the contrary; for as with the Celts and the Germanics (chap. 7) and the Greeks (chap. 29) the reasoned judgment is found before writing had arrived. Moreover, even after writing has arrived, the oral reasoned judgment is sometimes found, without committing it to written record. A notable instance is seen in the Isle of Man (chap. 2) where the reasoned judgment was for three centuries pronounced from the Deemsters' memory only, so that their law was popularly known as "breast-law", and not until the 1400s were they forced to record their judgments. So too in Judaea (chap. 28) there are no contemporary records extant of the long centuries of judgments before 100 A.D., and the first recording of their customs in the

Mishna was made from the memorized oral judgments of the past, though the Jews had already long been familiar with writing.

This persistence of the oral reasoned judgment long after writing had arrived is explainable by the motive of the reluctance of the esoteric group, the Deemsters, the Brehons, and the Rabbis, to part with the private knowledge which ensured their dominant influence.

The recording of the judgment finally prevails among all the advanced peoples, though not among the retarded ones.

B. *Policy*. That the judgment shall be publicly rendered, that it shall be recorded, and that it shall be reasoned, these features are now regarded as indispensable elements in all advanced trial-systems. "Abolish reports", said Edmund Burke, a century and a half ago, in the trial of Warren Hastings, "and you abolish the law of England!"

Nevertheless, in various ways there is from time to time a pressure of convenience to omit or to minimize these precautions in one or another class of judgments,—the demand for private judgments in juvenile courts, for memorandum opinions by crowded appellate courts, and for the omission of all reports to relieve the bulky burden of printed volumes. These contemporary tendencies are known to all, and need not be here elaborated. Enough to point out that all three requirements represent an evolution from primitive trial methods to advanced ones, and that experience demonstrates them to be inevitable and indispensable.

The public announcement, the permanent written record, the frank exposure of reasons,—these must ever be the pillars of a safe and just trial-procedure.

#### XI. The Evolution of "Justice", as a Motive for Controlling Trial-Procedure.

And now for one final question: At what point in these evolutionary stages, did the sense of Justice enter? That is, At what point did a community sense of Justice (i.e. fair treatment of the parties) come to be a motive in controlling the trial-procedure?

At the beginning, as we have above seen, the motive force in pursuing the injurer was unregulated emotional clan-revenge or clan retribution or clan compensation. Then came a stage of rational partial control through the motive of clan-preservation; the experienced older men realizing that the perpetual succession of feuds—each reciprocal homicide leading to a new family feud 'ad infinitum'—was weakening the clans, both defensively and offensively. Mohammed, when he forbade the blood-revenge feud and substituted a composition for a life-price, expressly avowed the motive of preserving the tribe from self-destruction. Herbert Spencer advanced this generalization long ago (*Justice*, § 112). The motive of clan preservation thus leads to various procedural expedients.

But in the final stages, represented by the advanced periods in each "civilized" community—the Greeks in Plato's time, the Romans in Cicero's time, the Germans in later medieval times—we begin to hear of the modern sense of "justice", as a conscious motive,—a motive for establishing a disinterested tribunal, for allowing ample delay to hold a hearing, for granting help to the accused in presenting his case and so on. This motive of "justice" then begins to dominate in framing the procedure. And the question arises, At what point did this motive enter and begin to dominate?

Today, with us moderns, it dominates completely (or at least in association with efficiency as a partly rival motive). But we find that the "justice" motive has been slow, even in historical times of some modern peoples, in receiving full recognition. For example, in England, the accused was not allowed process to obtain witnesses until the late 1600s; torture to obtain the accused's confession remained until the same period; and he was not allowed the aid of counsel in felony trials until 1836.

Obviously, we should have to search separately the annals of each race-stock or people in order to discover the start and progress of this motive. Perhaps indeed it could not be discoverable at all; for, in modern retarded primitive peoples—Africans, Amerindians, Oceanians—there are no records that might disclose their earlier conscious motives. But in any event, in this search among the

different peoples, we should have to identify and differentiate their differing generic traits,—ferocity or the reverse, honesty or the reverse, industriousness or the reverse, and so on, and their habits of life as pastoral or tribal, nomadic or settled, and so on; as Westermarck (for example) did in his "Origin and Growth of Moral Ideas". Two examples will illustrate this:

(1) In the modern Arctic regions (Chap. 16), a trial often had to be over-speedy, because when the alleged culprit was caught, many miles away from the shelter of the caves in which the fur-hunters had to live during the winter season, the parties might freeze to death, if the inquiry were prolonged. Here the climate produced a motive controlling one feature of trial-procedure. (2) In England the rooted devotion to the sports of the chase led to certain rules of fairness; e.g. the fox was always given a fair start ahead of the hounds; and the habits of the chase were once expressly invoked by Mr. (afterwards L.C.J.) Denman, in pleading for fairness to the accused on trial: "Human beings are never to be run down like beasts of prey without respect to the laws of the chase". This sporting theory of a gentleman's "justice" in procedure has been characteristic of the insular English. But, in contrast, it could not have operated on the Continent; for there the approved method for the aristocratic chase was to surround the forest game-areas with the beaters and drive the game into a small space until the victims made their exit in a rush in front of a platform; there stood the hunters with weapons ready, and in safety they picked off the game as it passed in front of them,—a method recorded in very modern times as used by a certain emperor. Here, the analogies of the rules of sport could never have furnished a motive for fair treatment of an accused.

Perhaps, after all, the proposition above, that the motive of "justice" has been slow in developing even in modern times, is erroneously stated. That is, the lack of certain precautions of fairness in the England of four centuries ago may mean, not that they did not then fully concede the duty of being "just" in trials, but merely that the then conception of "just" was imperfect. Our today's conception of the requirements of "justice" has improved

(as we should call it) over the earlier conception; yet the dominance of their then conception was no less than the dominance of our own today's conception.

Even so, the question is only thrown back for scrutiny into the origin of the conception however imperfect. That is, At what point did *any* conception of "justice" enter as a controlling motive for regulating particular features of trial procedure?

Whether this question can ever be answered by adequate search, we do not know.

Perhaps already, in the history of literature, some learned searcher has gathered the materials for a partial answer. There are indeed monographs in which the history of the formal definitions of "justice", in the broadest sense, has been fully examined (for example, Giorgio Del Vecchio, "Giustizia e Diritto", 2d ed. 1934). But, in the first place, the "justice" conception now involved in our question is specifically justice in the methods of getting at truth and merits in a controversy, and not "justice" in any of the senses of substantive law; the latter field seems to monopolize the survey of the philosophers. And, in the second place, the literary offerings hitherto vouchsafed on that general subject have contained indiscriminate comparisons of the idea of "justice" in all literatures,—Greek and Roman, ecclesiastical, juristical, and philosophical, ancient and modern. Yet, as a dominant fact in the evolution of trial-methods, it is clear (as pointed out above, more than once), that the whole process of evolution must have been different and independent in different race-stocks. Hence, this subject, like the others above, must be traced separately for each race-stock.

So the grand question still remains to be answered: At what point in the evolution of trial-procedure in the various peoples did Justice become a conscious motive in the community's control of that procedure?

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